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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-97.

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

vs.

RICHARD NEMITZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS.

THOMAS J. MURRAY, JR.,
Murray Building,
300 Central Avenue,
Sandusky, Ohio 44870,
Attorney for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0947

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS.

QUESTIONS PRESENTED.

1. Does an agreement between a railroad and union respecting employee protection made pursuant to the third sentence of Section 5(2)(f) of the Interstate Commerce Act relieve the Commission of any responsibility for assuring employee protection under the first two sentences of Section 5(2)(f)?

2. Does a post-merger collective agreement respecting employee merger protection which abrogates merger benefits collectively agreed upon prior to the consummation of the merger in question, violate the provisions of 49 U.S.C. Sections 5(2)(f), 8 and 9 so as to give rise to a cause of action under those Sections, even if it is assumed that the Commission made no provision for employee protection in its order of approval?

3. Are adversely affected employees, who for nearly three years have unsuccessfully attempted use of their contract remedy, barred from suing under 49 U.S.C. Sections 5(2)(f), 8, and 9 where their contract remedy is an arbitration clause which provides that disputes over matters of interpretation or application of the contract "may" be submitted to arbitration by the parties to the contract?

STATEMENT OF THE CASE.

1. Pre-merger Stage.

On October 16, 1964 the New York, Chicago and St. Louis Railroad (Nickel Plate) was merged into the Norfolk and Western Railway Company (N&W) with the N&W as the surviving entity. The transaction involved the assumption of control of several smaller lines by the combined company. Among these was the so-called Sandusky Line from Columbus, Ohio, to Sandusky, Ohio, purchased from the connecting railroad which was a subsidiary of the Pennsylvania Railroad (Pennsy). This dispute stems from the effect which the purchase of the Sandusky Line had upon certain employees of that line.

The N&W was desirous of obtaining the Sandusky Line since it provided a much needed connection between the existing N&W terminal at Columbus and the Nickel Plate's main line and principal yard at Bellevue, Ohio. Additionally, the acquisition of the Sandusky Line enabled the N&W, a primary coal hauling carrier, to extend its line to the Port of Sandusky giving it a single line capability from mine to shipping point thereby obviating the need for revenue sharing.* Joint Exhibit 6, pp. 25-26, 28.

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* Prior to 1964 N&W had used the Sandusky Line for transporting coal to the Port of Sandusky. In 1960, for example, N&W had hauled approximately 2.3 million tons over the Sandusky Line. Joint Exhibit 6, A. pp. 25-26.

Appellees are railroad trainmen who prior to October 16, 1964, were employees of the Sandusky Line. The Sandusky Line, although legally a separate entity, had been operated, prior to October 16, 1964, as a part of the Toledo Division of the Pennsy. The Sandusky Line, while carrying a large amount of agricultural products and general merchandise, was heavily utilized for moving coal to Pennsy's coal docks at Sandusky. When the winter freeze prevented navigation on Lake Erie, employment opportunities at Sandusky for more junior employees would diminish. When this occurred, those unable to hold jobs at Sandusky would exercise their seniority at other points in the Pennsy's Toledo Division. In this way the more junior trainmen were able to maintain their homes at Sandusky and remain employed throughout the year. The most adverse effect of the merger on the trainmen's employment situation at Sandusky was the fact that it split off the Sandusky Line from the remainder of their former seniority district thereby eliminating any chance for those who couldn't hold winter jobs at Sandusky to work elsewhere. For this reason, the conditions for employee protection in the Interstate Commerce Commission's order authorizing this merger were critically important to these more junior trainmen. The approach which the Interstate Commerce Commission took with respect to protecting employees affected by the merger was summarized by the Hearing Examiner as follows:

> "Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate and Wabash, as well as persons employed on the Sandusky Line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk &

> Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky Line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease and purchase, *all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.*" (A. 196.)

The agreement referred to by the Examiner is before the Court as Joint Exhibits 1 through 4 (A. 60-80). This agreement between N&W and the unions was signed on April 16, 1962, and was effective according to its terms on January 10, 1962, but did not actually go into effect until October 16, 1964, the date the merger was consummated. (This agreement will be referred to herein, for sake of clarity, as the "pre-merger agreement.") As noted by the Hearing Examiner, this pre-merger agreement is an attrition type agreement whereby "N&W agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved *with the guarantee that they will not be adversely affected in their employment as a result of the proposed transaction* or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue." *

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* The Hearing Examiner made these findings:

"*Effect upon employees*:—Based upon studies made on the Norfolk & Western, Nickel Plate and Wabash for the 5-year period 1956 through 1960 respecting the usual turn-

(Continued on following page)

In noting that the agreement between the railroad and unions guaranteed employees of the lines involved that "they will not be adversely affected in their employment as a result of the proposed transactions," the Interstate Commerce Commission was referring to the language in the pre-merger agreement which states "* * * that none of such employees shall be deprived of employment or placed in a worse position with respect to *compensation at any time during such employment* except that Norfolk & Western shall not be required to provide *employment* to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition * * *" (A. 67). The method for determining the amount of compensation protection due adversely affected employees was set forth in the pre-merger agreement in Joint Exhibit 4 and basically provided for determination of the "average monthly compensation" of the employee for the last 12 months before the merger in which he performed service and supplementing monthly earnings each month to reach that amount (A. 77-78). The Commission found that these agreements satisfied the requirements of 49 U.S.C. Sec. 5(2)(f) and stated in its report:

(*Continued from preceding page*)

over in employment by reason of retirements, resignations, deaths and dismissals for cause, it appears that the proposed merger, lease and purchase would have little or no adverse effect on the carriers' employees. The studies reveal that the turnover, termed 'normal attrition,' averaged 4,314 employees annually for the 5-year period. Based upon that average and the plan of operation to be undertaken by the new system, applicants expect that substantially more jobs will become available on the combined system within one year after the unification than the net number of jobs expected to be eliminated as a result thereof." (Joint Exhibit 6, pp. 32-33).

> "It was stipulated that under any report and order approving the proposed merger, lease and purchase it may be considered that these agreements were made pursuant to and in conformity with section 5(2)(f) of the act for the protection of the covered employees." (A. 197.)

Having found the pre-merger agreements in conformity with Sec. 5(2)(f), the Commission made its authorization "subject to such agreements" 324 I.C.C. at 50. The only qualifications, so far as pertinent to this cause, which the pre-merger agreement placed upon the guarantee that *Sandusky Line employees* who accepted N&W employment would not be "placed in a worse position with respect to *compensation*" at any time during N&W employment, was the provision that "Norfolk and Western shall *not be required to provide employment* to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition." *

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* Neither the trainmen nor their union has ever claimed that this agreement guaranteed them "employment" up to the time worked on the Sandusky Line prior to the merger. They have sought only the compensation protection promised. Regarding this part of Section 3 the District Court stated:

> "This Court is not unaware that the language of Joint Exhibit 1 says that employees shall not be placed in a worse position with respect to their employment except due to furloughs on account of seasonal requirements or decline in traffic or revenue, and that the language of Joint Exhibit 1 (p. 9) clearly differentiates between employment and compensation in another paragraph of the same section. The Court, however, will construe this in the light which provides the least coverage, noting that the language of 49 U.S.C. Sec. 5(2)(f) only speaks of employment but the term as therein used has been used to cover both employment and compensation. While this construc-

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While *Sandusky Line employees* are guaranteed protection up to their pre-merger "average monthly compensation," less protection is offered to *former Pennsy employees whose employment connection was not with the Sandusky Line.* Concerning Pennsylvania employees who elect to become N&W employees as a result of being displaced by a Sandusky Line employee who elects to move to Toledo, Ohio and maintain his seniority on the remainder of the Pennsy's Toledo Division, the pre-merger agreement provides:

> "* * * In the event any such employee (Sandusky Line employee) elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide *employment* or *compensation* to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition." (A. 68.)

The limitation on protection offered displaced Pennsy employees served as a protective deterrent against having

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tion results in an inconsistency in the use of terms within Joint Exhibit 1, it is not the Court's intention that this construction be considered the determination of the actual intent of the parties."

to pay compensation protection to employees whose primary working connection was with parts of Pennsy's Toledo Division outside of Sandusky, and who might elect to come over to N&W in the event Sandusky Line employees diminished their work opportunities by electing to remain with the Pennsy. The net effect was to encourage Sandusky Line employees—those whose homes were in Sandusky and whose primary employment connection was with the Sandusky Line—to accept N&W employment and to *discourage* other of Pennsy's Toledo Division employees from accepting N&W employment.*

As will be demonstrated below, the distinction made in the pre-merger agreement between protection offered Sandusky Line employees and that offered displaced Pennsy employees is critically important in understanding the events which gave rise to this dispute. This distinction is more easily grasped when the language in the pre-merger agreements respecting these two categories of employees is jutaposed for purposes of comparison.**

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* Respondents know of no case where a Sandusky Line employee displaced a Pennsy employee, so that this provision of Section 3, which ostensibly served its purpose, is not involved in this dispute.

** Protection Promised	Protection Promised
Sandusky Line Employees who elect N&W employment	Pennsy Employees displaced by Sandusky Line Employees who elect to remain with Pennsy.
"* * * all employees * * * who during such period have exercised employment rights on said Sandusky Line * * * (shall not) * * * be deprived of *employment* or placed in a worse position with respect to *compensation* at any time during such employment except that Norfolk & Western shall not	"* * * In the event any such (Sandusky Line) employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced

(Continued on following page)

Fifteen days before the effective date of the merger, Sandusky Line employees received written notification (A. 142-143) which informed them that:

> "* * * effective October 16, 1964 . . . the Norfolk and Western Railway Company will purchase the Sandusky Line and proposes to establish the following runs on that line * * *.
>
> "To man the above runs, the Norfolk and Western Railway Company hereby offers to take into its employment employees of the Pennsylvania Railroad who were eligible under the terms and provisions of Section 3 of the 'Agreement for protection of employees in event of approval of merger and related applications' . . . dated January 10, 1962, and who elect to accept such employment under the terms and provisions of Section 3 of the above agreement."

A copy of Section 3 was attached to this notice.

(*Continued from preceding page*)

Protection Promised	Protection Promised
be required to provide *employment* to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition."	by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide *employment* or *compensation* to any such employee during any year, commencing on the effective date of such acquisition, of greater *duration* or *amount* than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition."

To the more senior men who could anticipate holding jobs at Sandusky even during the transitional period, the merger simply meant doing the same work for a different employer. To the more junior employees—those who had been unable to hold jobs at Sandusky during the winter decline in business—this notice was a promise of better things to come. As noted above, Section 3 of the pre-merger agreement, which was attached to these notices, guaranteed these trainmen that although "Norfolk and Western shall not be required to provide **employment** to any such employee during any year . . . of greater duration than such employee enjoyed on said line the twelve months' period immediately preceding the effective date of said acquisition," nonetheless, N&W explicitly promised that "none of such employees shall be . . . placed in a worse position with respect to **compensation** *at any time during such employment* * * *." This promise meant that the trainmen, rather than uproot their families, could remain at Sandusky with their compensation protected in the event they were unable to hold a job during the transitional period of N&W's takeover of operations at Sandusky.

Based upon these promises, some 96 trainmen elected to accept employment with N&W. Of this 96, approximately one-half were men who had made their homes at or near Sandusky, and the remainder were men who had worked on the Sandusky Line with Columbus, Ohio, as their home terminal. Of the approximately 50 men who made their homes at Sandusky, approximately 25 were junior men who had been required to work during the off season on other parts of the Toledo Division, *particularly during the year immediately preceding the merger during which business on the Sandusky Line had de-*

creased substantially (A. 211). These 25 trainmen are the plaintiffs in this action.

2. Post-merger Stage.

Unfortunately, the transitional period at Sandusky lasted for nearly a year and a half. During this 18 month period these 25 trainmen were unable to hold jobs at Sandusky. This dispute involves the so far unsuccessful attempt by these 25 junior trainmen to receive the compensation protection promised them under the pre-merger agreement. What follows is an outline of the facts which led to the trainmen's claim being placed in litigation.

For over a year after the merger, and while their financial situation worsened, these trainmen were not paid a single cent by way of promised benefits. N&W gave as an excuse for this delay, the fact that it was having difficulty in obtaining the earnings records from Pennsy necessary to calculate benefits due, although it admitted that during the months prior to the merger it did not take a single step to obtain these earnings records from Pennsy so as to be prepared to deal with these benefit claims during the immediate post-merger period when these benefits would be most needed by adversely affected employees (A. 209, 210).

As the financial position of the junior trainmen worsened, pressure mounted within their union, Brotherhood of Railroad Trainmen, for relief. As months passed and N&W continued to excuse its failure to pay benefits, what occurred is well summarized in a letter of Union General Chairman McNeel, included as part of N&W's Exhibit P at A. 178-179:

> "On July 13, 1965, reasoning that more than a reasonable time had elapsed to enable the Norfolk and

Western Railway Company to arrive at the proper figure to be used for the Sandusky trainmen under Section 3, we wrote to Mr. Frank Johnson, Manager-Personnel, Norfolk and Western Railway Company, who had, at that time been designated to handle this, urging him to complete the Test Period Earnings List without further delay. Mr. Johnson answered our letter advising us that the Norfolk and Western Railway Company still did not have the Sandusky Earnings separated and when the correct figures were available, he would advise us.

"Again, on September 3, 1965, having had no further word from Mr. Johnson on this subject, we again wrote to him and advised him that we had no alternative but to invoke Section 1 (d) of the January 10, 1962, Agreement which reads as follows: (arbitration clause of the agreement quoted here)

* * * * *

"On October 5, 1965, with still no word from Mr. Johnson, we wrote to President C. Luna (Union National President Charles Luna) outlining our problem in this matter, advising him of our desire to invoke Section 1 (d) and requesting that Brother J. M. King, Vice President, Brotherhood of Railroad Trainmen, be assigned as our member of the Arbitration Commitee.

"In a letter dated October 7, 1965, President C. Luna agreed with our opinion and suggested the proper measures to take to bring this matter to Arbitration as provided in Section 1 (d) above quoted.

"In a letter dated October 8, 1965, we wrote to Mr. H. C. Wyatt in compliance with Brother C. Luna's instructions. Mr. Wyatt, Senior Vice President, Norfolk and Western Railway Company answered our letter and notified us that Mr. Frank Johnson would be their member of the Arbitration Committee.

"Before this matter could be brought to arbitration, a conference was arranged in Mr. Johnson's office in Cleveland and Implementing Agreement 1-A was

signed as well as the Letter of Understanding which is herein being appealed."

The Letter of Understanding and Implementing Agreement 1-A referred to are before the Court as Joint Exhibits 9 and 10. (These exhibits will be referred to herein as the "post-merger agreements.") It is N&W's position that these post-merger agreements were intended to limit these junior trainmen's compensation protection to their earnings on the Sandusky Line during the 12 months before the merger, divided by 12, regardless of *how many months* such employee had actually worked at Sandusky during that period. For example, an employee who worked only 4 months at Sandusky during this 12 months because of slackness in Pennsy's business during that period, and who averaged $400.00 a month would have his compensation protected *only if he earned less than $100.00* (i.e. the quotient arrived at by dividing $1,200.00, his total test period earnings, by 12).*

Briefly, it is the trainmen's position that the post-merger agreements, to the extent they were intended to apply to the junior trainmen at all, were intended as merely a temporary expedient aimed at palliating their dire post-merger financial position until N&W had obtained complete earnings records from Pennsy; that while their union may have acceded to N&W's proposal that protective benefits would be calculated based upon Sandusky earnings, the post-merger agreements were never intended to derogate the principle embodied in the pre-merger agreements that protective benefits would be paid up to a genuine "average monthly compensation," namely, a quotient reflecting what an employee typically earned

* That this harsh result was fully understood by N&W is reflected by the testimony of N&W's Mr. Johnson (Johnson Deposition, p. 58).

for a month's service; and that the evidence shows that no formula other than that expressed in the pre-merger agreements was ever settled upon as the means of calculating benefits due the junior trainmen who most needed post-merger compensation protection and who have never received it.

The District Court, for purposes of resolving the parties' motions for summary judgment, accepted as true N&W's position as to the intent and effect of the post-merger agreements and did not have to decide the merits of the trainmen's position. The court held that a post-merger agreement which abridges the basic merger protection afforded employees is unenforceable as a matter of law and public policy. These post-merger agreements have received considerable attention in petitioner's brief. The trainmen believe that the evidence concerning these agreements explains a great deal about the concrete realities which generated this suit and bears heavily on the questions before this Court. For these reasons a careful discussion of these agreements seems justified.

The post-merger agreements were signed by the union's General Chairman, J. F. McNeel. The General Chairman's office stands at an intermediate level between the national union headquarters and the local union, and is the regional arm of the union which handles most business on behalf of its members which cannot be resolved locally. It was this intermediate union officer, whose office is located at Columbus, Ohio, who signed the post-merger agreements represented by Exhibits 9 and 10 (A. 85-91). The Union General Chairman's understanding with respect to the post-merger agreements was expressed in N&W's Exhibit P at A. 140 where he described the intended effect of the post-merger agreements regarding the claims of the junior trainmen as follows:

"Upon receipt of the Earnings Sheets furnished the Norfolk and Western Railroad Company, we compiled separate Earnings Sheets using 75% of each man's total earnings on the Pennsylvania Railroad Company in the twelve months prior to the effective date of the merger and purchase. All of this information was then furnished to the interested local chairmen and lodge secretaries with the explanation that *this was only a temporary understanding and was made in order to help the Sandusky trainmen who were in immediate need of funds due to being on furlough status.*

"We reasoned that the trainmen presently working on this district were generally earning in excess of their Certified Protection Earnings and were in no need of financial assistance." (Emphasis ours).

McNeel's reference to "the trainmen presently working on the district," of course, describes the more senior trainmen who elected N&W employment and who are not plaintiffs in this action. The Union General Chairman thus understood that the post-merger agreements had a dual purpose; while they permitted the immediate determination of whatever limited benefits were due the more senior trainmen, it also permitted payment of *temporary relief based upon 75% of total Toledo Division earnings for junior trainmen* until Sandusky earnings could be segregated and a final formula worked out *under the pre-merger agreement* for calculating benefits due based upon Sandusky Line earnings. This arrangement admittedly involved two concessions to N&W on the part of the General Chairman. (1) It meant a slight reduction in benefits for those senior men who, although they performed service in Sandusky during each of the 12 months before the merger, also performed some road service outside of the Sandusky Line. The reason for this slight

reduction is explained below.* (2) It meant that there would be further delay before necessary earnings records could be obtained in order to determine a workable formula under the pre-merger agreements for calculating the benefits due the junior trainmen.** As tortuous and

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* The October 25, 1965, agreements provided that if temporary payments were greater than 100% Sandusky earnings, overpayments would be refunded. This apparent paradox, that is the possibility that 100% Sandusky earnings would be less than the temporary 75% Pennsylvania earnings was explained by Local Chairman Fitz in his deposition (Fitz deposition pp. 92-94). That Fitz's explanation was correct, was categorically admitted by N&W's Fred Yancey (Yancey deposition pp. 65-67). What this testimony shows is that as far as men with a full 12 months earnings at Sandusky were concerned it was agreed that their 12 months Sandusky earnings divided by 12 would be used in calculating their average monthly compensation and that any road assignments throughout the Toledo Division during that period would not be included. If a senior employee's road assignments amounted to more than 25% of his total earnings, it would mean that when Sandusky earnings records were obtained these men would have to repay N&W to the extent that 75% Toledo Division earnings exceeded total Sandusky Line earnings. While the men with full Sandusky earnings are not plaintiffs in this action, it is interesting to note that the General Chairman made a substantial concession to N&W by agreeing that only Sandusky earnings for the last 12 months during which services were performed at Sandusky rather than the entire Toledo Division would be used with respect to these senior men.

** Several possible formulas were discussed: (1) earnings for the last 12 months of services performed on the entire Toledo Division divided by 12; (2) earnings for the last 12 months in which services were performed at Sandusky, even if this required going back well beyond the year prior to the merger to obtain 12 months of compensated service, divided by 12; (3) earnings at Sandusky divided by the number of months in which service at Sandusky was actually performed. Obviously any one of these formulas would have provided a level of compensation protection approximating "average monthly earnings" before the merger. Local Chairman Fitz's position was that the third alternative, that is earnings divided by the months actually worked, would provide the most expeditious means in settling this matter in view of the difficulty in getting earnings records beyond the 12 months before the merger (Fitz deposition pp. 56,

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complicated as the foregoing description of the purposes and intent of the post-merger agreements may seem, the evidence of record as to what occurred *after* these agreements were executed strongly supports the correctness of the trainmen's position. A brief review of this evidence follows.

On February 23, 1966, shortly after N&W indicated that it would interpret the post-merger agreements so as to restrict the junior trainmen's benefits to Sandusky Line earnings during the 12 months before the merger divided by 12, regardless of how few months a trainman had actually worked at Sandusky during that 12 month period, Union Vice President Montgomery wrote N&W Vice President Wyatt in pertinent part as follows:

> "Please refer to your letter addressed to me under date of April 23, 1962, confirming our discussions in Washington, D.C., on that date, concerning the proposed agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514, and I would like to deal with a pertinent part of that letter found on page 3, which is identified as and titled VIII, Section 3.
>
> "As you will recall, Vice President J. M. King accompanied me at this meeting and considerable time was spent in discussing the district from which the men who would cover the new Norfolk and Western Railway you propose to buy from the Pennsylvania Railroad, from Sandusky to Columbus, Ohio, which you advise will serve as the connecting link

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(*Continued from preceding page*)

57). However, as the record shows, no agreement as to a formula under the January 10, 1962, agreements with respect to the plaintiffs' claims was ever agreed upon.

between the Norfolk and Western at Columbus and the Nickel Plate at Bellevue, Ohio.

"If my memory serves me correctly, you had a map of the proposed system on the wall of your private car and in discussion of the particular phase of your merger, I pointed out to you that the seniority district for these men encompassed Sandusky, Toledo and Columbus and advised, when we were talking, about how the men would make the transfer from Pennsylvania employment to N&W employment why it would be necessary to place bulletins at all three points so that the 50 senior men would have first opportunity for their job in seniority order on the Norfolk and Western.

"I am now advised that your representatives are holding that the area from Sandusky to Columbus comprises the seniority district, contrary to my understanding with you on April 23, 1962.

"I am told that the seniority district for the men who took employment with your merged railroad over the so-called Scioto Division *held seniority on a common seniority roster on the Pennsylvania Railroad Toledo Division, Lake Region, and exercised seniority indiscriminately on the former Sandusky line of the Toledo Division, Toledo, Ohio-yard and road, Detroit-yard and Columbus-road, and in exercising their seniority their position on the seniority roster of this particular district was given full recognition.*

"It was not my understanding, when we met in 1962, that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, *but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line.*"

Union Vice President Montgomery's letter apparently had some effect. Shortly after N&W made the "temporary"

payments as called for by the "understanding" of October 25, 1965, N&W Vice President Wyatt wrote Union General Chairman McNeel in a letter dated April, 1966, as follows:

> "Please refer to our conference in your office at Columbus, Ohio, on March 31, 1966, at which were also present Messrs. P. V. Hemmer, J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Trainmen and Conductors, allegedly adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.
>
> * * * * *
>
> "It was further understood and agreed that this settlement is made without prejudice to the position of either party and with reservations made by members of your Committee providing for further consideration of certain of these and several additional claims of record covering the above-mentioned period." (A. 198).

To this letter Union Chairman McNeel responded, in pertinent part by letter dated April 11, 1966:

> "As stated above, we are agreeable to accepting the amounts listed on the attached list, *until this matter is finally resolved as the claimants are in dire need of the money. We do anticipate further handling of this matter,* as soon as prior commitments will allow. We will advise you of what steps we desire at some future date." (A. 200).

Union General Chairman McNeel's understanding as to the meaning of this letter exchange is summarized by McNeel in N&W's Exhibit P at A. 141 as follows:

> "On April 7, 1966, Mr. Wyatt informed us that he was agreeable to paying these claims in accordance with the understanding of the Letter of October 25, 1965, and *with the realization that this settlement*

would be without prejudice to our respective positions on these and other claims.

"We replied to Mr. Wyatt by letter dated April 11, 1966, and clearly set forth our position on these claims.

"*Realizing that this matter is far from solved,* we wrote Brother J. M. King this same date requesting that he meet with us to discuss this matter with the thought that such a meeting would be of great help in *devising a method to pursue in order to arrive at a final fair settlement of this problem.* Due to Brother King's other duties, this meeting has never been held."

Shortly after this exchange of letters in June of 1966, Union Vice President King and General Committee Secretary Hemmer met with N&W Vice President Noell at Roanoke and specifically raised the same objection to N&W's position which Union Vice President Montgomery's letter of February 23, 1966, had raised. Mr. Noell's recollections of this meeting were elicited on cross-examination as follows:

"Q. Anything you want to include, of course, can be included in Mr. Curphey's redirect examination. My question to you, Mr. Noell, is, in view of your testimony that you were acquainted with this letter [Union Vice President Montgomery's letter of February 23, 1966, quoted at pp. 17-18 above], is it not a fact that you were aware, during the time that you were dealing with this problem, that at least Mr. McNeel's superior was of the position that those men with less than full one hundred percent Sandusky Line earnings would be entitled to protective benefits?

A. I recall seeing this letter, which is dated in 1966. If I recall my earlier testimony, I said that at a certain period—or during the negotiations I had not heard Mr. McNeel take any position that anything other than Section 3 applied to the Sandusky District employees.

Q. Isn't it a fact that some time prior to January 28—between January 1st and that date in June that Mr. Hemmer and Mr. King both met with you and made their position clear that whatever formula was eventually worked out for those men with less than one hundred percent Sandusky Line earnings under the January 10, 1962 agreement, would have to include consideration for a full twelve months in which these men performed service, in accordance with the Memorandum of Understanding attached to the January 10, 1962 agreement.

A. Messrs. King and Hemmer came to Roanoke some time in June, 1966—not prior to this time—and that's when they made—only really raised the question, and I told them that Section 3 applied to the people on the Sandusky District—and this was made clear to everyone during the earlier negotiations, and was also included in our offer of employment to the people on the former Pennsylvania Railroad.

Q. I see. So that I am perfectly clear, then, Mr. Noell, what you have just told us, you were aware of Montgomery's letter before King and Hemmer came to Roanoke in June of 1966?

A. That is right.

Q. And at the time King and Hemmer came here they raised the question.

A. They just raised the question."

In July of 1966, Local Chairman Fitz appealed to the Union's National Board of Appeals. It is N&W's position that the Union Board of Appeals completely contradicted the position of Union Vice Presidents King and Montgomery and supported the position of N&W with respect to the intent of the post-merger agreements (Petitioner's Brief pp. 47-51). A close look at the Union Board of Appeals' decision, however, reflects that if that decision, in fact, rejected the trainmen's position, it did so as a result of a patently mistaken reading of the pre-merger agreements. Faced with Local Chairman Fitz's concern that the post-

merger agreements may have prejudiced the junior trainmen's claims to long awaited compensation protection, the Union Board of Appeals seems to reject the trainmen's argument, as expressed by their local chairman, that they are entitled to compensation protection up to a genuine "average monthly compensation" as called for by the pre-merger agreement. In this regard the Board of Appeals stated:

> "We feel that the above effectively answers the latest contention of the appellant in this instant case concerning the method of arriving at the test period and the average monthly compensation as these very items are spelled out in the memorandum cited above.
>
> "Section 3 of title VIII of the 'Agreement Effective January 10, 1962, and Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514,' known as Exhibits 'B' and 'E,' among other things, provides for employment or compensation to protected or adversely affected employees but with certain strings attached, to wit: '* * * *Norfolk and Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid for to the Sandusky Line employee* * * *.'" (A. 148).

Of critical importance, however, is the fact that the Board of Appeals quotes that *part of Section 3 of the pre-merger agreement which applies to Pennsy employees displaced by Sandusky Line employees choosing to remain with the Pennsy and who because they were displaced might decide to elect N&W employment.* None of the plaintiffs-trainmen, however, are displaced Pennsy em-

ployees. They are *all* Sandusky Line employees who, as set forth above, were explicitly promised by Section 3 compensation protection up to an amount equal to *12 months of compensated service divided by 12.* Unfortunately, the signatures to the Board's decision, which is before the court as N&W's exhibit P, are "illegible" (A. 150) so that it is not clear from the record who the union representatives were who sat on the Appeals Board. It is clear, however, that the Union Board quoted a patently inapplicable part of the pre-merger agreement in apparently rejecting Local Chairman Fitz's appeal. It is this part of the Board's decision upon which N&W heavily relies to support its position that the Union agreed with the railroad's position regarding the intent of the post-merger agreements and rejected that of the trainmen (Petitioner's Brief, pp. 47 to 52).

On the other hand, the Union Appeals Board seems to support the position of the trainmen in that portion of the decision which the trainmen believe is the real gist of its ruling. The Board concluded its decision as follows:

> "Still to be resolved is the propriety of the Letter of Understanding of October 25, 1965. If Section 3 of the January 10, 1962, Agreement is controlling in the instant case, and we believe it is, then there is nothing wrong with the Letter of Understanding. It does not conflict in any way with the controlling docket which spells out the protection features of adversely affected employees, because the "Understanding" merely provides for monetary help for the distressed membership of up to 75% of their entitlement pending the certification and payment of the final figures in full settlement.
>
> "In the letter and attachments submitted to us after the oral hearings was concluded, we can find no fresh evidence or argument that was not thoroughly explored during the hearing. We do note, as a final

plea, the appellant requests relief from Implementing Agreement '1-A.'

"The Board finds no merit in this latest thesis of the appellant. We are convinced that no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement '1-A' or the Letter of Understanding of October 25, 1965, under appeal.

"We believe that General Chairman J. F. McNeel's actions in the instant case are right, proper and just and in conformity with the controlling I.C.C. Dockets that appear in Exhibits 'B' and 'E'. Consequently, the appeal is denied." (A. 149-150).

Exhibits "B" and "E" referred to by the Board were those portions of the pre-merger agreement which promised the Sandusky Line *employees that they would not be placed in a worse position as to compensation by the merger* (Exhibit "B") and which contained the *requirement that an employee's "average monthly compensation" be based upon 12 months in which he performed service divided by 12* (Exhibit "E").* In other words, the Board of Appeals here seems to recognize the fact that the post-merger agreements leave unsettled the problem of working out a formula under the pre-merger agreements for junior trainmen once earnings records are finally available.** It also approves the Union General Chairman's making of a "temporary agreement" as to the junior trainmen's claims "because the 'Understanding' merely provides for monetary help for the distressed membership of up to 75% of this entitlement pending the certification and payment of the final figures in full settlement."

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* Exhibit "B" is before the court as Joint Exhibit No. 1 (A. 60) and Exhibit "E" is Joint Exhibit No. 4 (A. 77).

** The several possible formulas which would probably meet the requirements of Section 3 of the pre-merger agreements fully protecting compensation are described at p. 16, *supra*.

Local Chairman Fitz, on cross-examination, explained the purpose of his appeal to the National Union Board and his understanding of the Board's ruling as follows:

"Q. Now, another appeal was taken with regard to this letter of October 25, 1965; is that right?

A. An appeal was taken not—not another. We referred to an appeal here in the record. An appeal was taken July 21, 1966—yes; that's right.

Q. That was the date of the hearing?

A. That was the date of the hearing; yes.

Q. Am I correct that you took this appeal by means of a letter under date of April 27, 1966?

A. Well, I would have to check. I thought the date was April 26; you're probably right.

Q. Very well. It was taken one or the other?

A. Yes.

Q. This would be shortly after this conference in Columbus?

A. Yes.

Q. And you were appealing from—withdraw that—your appeal related to General Chairman McNeel having entered into this Letter of Understanding of October 25, 1965; is that right?

A. That is correct.

Q. So, again, you were—as you previously explained to me, you were objecting to this understanding for temporary payments. You wanted to have the matter finally settled in accordance with the formula that you felt was applicable?

A. You're half right.

Q. Very well. Explain the other half to me.

A. Under the Constitution of the Brotherhood of Railroad Trainmen, and I might add there is one thing that the Local Chairmans become extremely aware of, as a matter of fact, that is the first thing they become aware of, is time limits.

Under our Constitution we have to be aware of it. Now, the time limit on appeals under Rule 13 is one year.

The Board convenes in January and July. I did not get by the January Board and my last shot at the appeal was the July Board of Appeals, and I appealed because I still felt that the earnings should be over the entire division, and also to protect myself under the Constitution, because I wouldn't have been able to come back and say at some future date that I took exception to this, and then the men could come and say, 'Why didn't you appeal?'

This is why I appealed under the rules of the Constitution, and I protected myself in this spot, because the next session of the Board of Appeals would have put me beyond the time limits.

Q. I see. When you use the expression, earnings over the entire division, are you using that as opposed to earnings on the Sandusky Line?

A. I am.

Q. As opposed—

A. So once again I might repeat myself here, but I think you covered this in one of your previous questions and answers, that the Norfolk and Western's position at this conference on March 31, 1966, was pretty clear in my own mind, that they were going to use a formula based upon the Sandusky Line earnings only, and this was the whole bone of contention, that they couldn't get these earnings segregated, and this was why Jack (Jack McNeel, Union General Chairman) said the reason for the Letter of Understanding, and I told Jack I understood it, and he told me that in all eventuality we would probably end up with 100 percent Toledo earnings anyways, but he was in contact with the Columbus men and there was pressure coming from all directions to get something moving.

* * * * *

Q. And I understand your appeal with regard to the October 25, 1965 Letter of Understanding was denied; is that right?

A. It was denied, and I got the message from the Board of Appeals that, 'Joe, you are an alarmist. Your

men have protection under the January, 1962 agreement, and you don't have a thing to worry about.' "

3. Events Which Precipitated Litigation

After his appeal to the Union's National Board, Local Chairman Fitz continued to pressure his General Chairman to get the N&W to move in getting the necessary earnings records from Pennsy so that a formula could finally be worked out under the pre-merger agreements which would fully compensate the junior trainmen. In response to this urging, Union General Chairman McNeel met with N&W Vice President Noell in Roanoke, Virginia, on August 3, 1966, at which meeting the problem of working out a formula for compensating the junior trainmen at Sandusky was discussed. Regarding this meeting, McNeel wrote N&W Vice President Noell, on October 12, 1966, in pertinent part as follows:

> "At our meeting on August 3, 1966 in Roanoke, we had the clear understanding that the original list furnished you by the Pennsylvania Railroad Company would be the figure acceptable to us and that we would agree to certify the figures shown on the original list, with certain corrections for Mr. K. D. White and Mr. R. S. Shilling, and the agreed upon seven percent (7%) wage increase added on.
>
> "We also agreed that *we would again meet with you and work out an acceptable formula for the remaining trainmen, who made either part of their 'test period earnings' on the Sandusky Line, and for the few men who had no 'test period earnings' on the Sandusky Line.*
>
> "We cannot understand why you would deviate from our agreed upon principles established in our August 3, 1966 meeting and attempt to use the more recent and definitely inaccurate list you mailed with your letter of October 4, 1966.

> *"Please arrange to have the list of the one hundred percent (100%) Sandusky earnings men completed so that we may certify this list and then move on to the remaining men, who do not have one hundred percent (100%) Sandusky earnings."* (A. 201-202)

Thus, the Union General Chairman's letter shows that as of October 1966, a year after the post-merger agreements were signed, discussions were still taking place regarding the matter of proper *formula* for compensating these junior trainmen who had worked less than a 12 full months at Sandusky during the year preceding the merger.

N&W took the position during discovery proceedings that *no formula was actually worked out respecting the benefits of these junior trainmen until February 20, 1967 at which time an oral agreement was allegedly reached.* This testimony given by N&W's Mr. Yancey, who was solely charged with handling the trainmen's claims (A. 209), flatly contradicts petitioner's position that the post-merger agreements of October 25, 1965, *finally resolved the formula to be used in calculating these junior trainmen's benefits by limiting their "average monthly compensation" to Sandusky earnings only during the 12 months before the merger, divided by 12, regardless of how few months* a man may have worked at Sandusky during that period (A. 220-224).

While Mr. Yancey admitted that no accredited representative of the trainmen ever signed an agreement settling the claims of these trainmen, he did assert that N&W, on March 3, 1967, had put its position in writing to Union General Chairman McNeel. It was this meeting of February 20, 1967, at Roanoke, attended by Local Chairman Fitz together with General Chairman McNeel, and the subsequent letter of March 3, 1967, which finally convinced Fitz that the only chance he had of getting effective action

was through the courts. As the Local Chairman explained it on deposition:

"Q. Did Mr. McNeel send you a copy of this letter of March 3, 1967?

A. He did; that was the impetus that sent me to an attorney, that was the thing that made me see an attorney, *because I had tried everything in my power to settle this thing reasonably*, and I asked Steve Young (United States Senator Stephen Young) anybody that would bend an ear to me to help, and I got the same advice from all the people involved, that the I.C.C. has the power invested in them to order the merger, but they do not have the power to police it, and if you have a problem, go see an attorney, so I eventually took their advice.

Q. Did you discuss with Mr. McNeel sending a reply to this letter?

A. I may have mentioned it to him in an offhand way but Jack (J. F. McNeel, Union General Chairman) looked at it and shook his head and said that this was ridiculous and that was about the extent of our conversation along those lines, I would expect.

Q. Well, you did not have any discussions about replying to it, I gather?

A. Not to my recollection. Like I say, I might have made an offhand comment on it or something like that, but at this point I was convinced there was only one way to resolve this thing properly.

Q. Well, to your knowledge, Mr. McNeel did not, in fact, reply to the letter?

A. To the best of my knowledge he didn't.

Q. Then how about the letter of April 3, 1967, with reference to the later period of December, 1965 through September, 1966; do you know whether he replied to that letter?

A. I don't know that he directly replied to it. There was—I'm not even sure of that. I can't say. I honestly don't know, Mr. Curphey.

Q. To the best of your knowledge, did Mr. McNeel have the same understanding as a result of this conference as you did?

A. Absolutely; even as late as October, 1968, he gave me correspondence to that effect, that our people were entitled to the protection of the January 10, 1962 agreement."

To fully comprehend the plight of the trainmen and what led to suit being filed, it is necessary to closely examine what N&W purported to do by its letter of March 3, 1967, which, according to N&W's Mr. Yancey, embodied an oral understanding reached on February 20, 1967 at Roanoke. In pertinent part, the March 3, 1967 letter prepared by Mr. Yancey, but signed by N&W Vice President Noell, reads:

"Please refer to our conference on February 20, 1967, at which were also present Messrs. J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Conductors and Brakemen, *allegedly adversely affected* by the merger for the period October 16, 1964, through the months of September, 1966, under the provisions of Section 3 of the Agreement of January 10, 1969, were reconsidered in the light of the adjusted 'Test Periods' as agreed to.

"We agreed to dispose of these claims as tabulated on Attachments 'A,' 'B' and 'C' herewith.

* * * * *

"Attachment 'C' shows the adjusted amount of overpayment made to twenty-five employees on April 7, 1966, under letter agreement of October 25, 1965." (A. 151).

Attachment "C" contains the names of most of the plaintiff trainmen.* The last three columns of Attach-

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* The last paragraph purports to hold the claims of four trainmen, including plaintiff R. N. Nemitz "in abeyance for further information and consideration." (A. 151)

ment "C," which are produced below,* dramatically and graphically show exactly what happened to the junior trainmen and what precipitated litigation. The first column reflects the total amount of compensation protection which N&W claimed was due each of the 25 trainmen listed as of March 3, 1967. The second column shows the amount of temporary benefits "paid April 7, 1966," under the terms of the post-merger agreements of October 25, 1965. The third column purports to show the amounts which N&W claims were overpaid to each trainman under the "temporary agreements" and which N&W claimed were to be repaid.

To grasp the net effect of this letter it is necessary to recall that N&W Vice President Wyatt had included the following proviso in the letter "Understanding" of October 25, 1965:

> "You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits

* Name	Total Due	Paid April 7, 1966	Overpaid
W. H. Lippert, Jr.	$ —	$ 42.75	$ 42.75
W. C. Dowler	158.69	203.84	45.15
A. Caponi	137.10	729.05	591.95
H. W. Barnam, Jr.	161.50	681.34	519.84
T. O. Klein	982.08	1,438.47	456.39
E. J. Maloney	—	79.24	79.24
A. A. Mischler	741.72	1,635.84	894.12
K. H. Lippert	—	253.01	253.01
G. M. Swain	1,319.63	2,184.54	864.91
J. E. Fitz	868.73	1,558.90	690.17
M. J. Riley	1,086.96	3,452.84	2,365.88
L. J. Wuertz, Jr.	433.63	1,072.20	638.57
H. I. Fearing	—	403.77	403.77
C. L. Dowell	—	720.22	720.22
J. R. Smith	—	439.32	439.32
H. W. McCool	578.66	720.63	141.97
A. R. Hall	—	524.24	524.24
W. H. Tippie, Jr.	—	334.82	334.82
E. W. Cheek	21.34	271.70	250.36
D. L. Yost	—	297.13	297.13
J. E. Lauer	4.36	464.32	459.96
D. G. Miller	—	558.98	558.98
T. L. Townsley	—	386.63	386.63
R. G. Horne	—	292.67	292.67
D. H. Mischler	—	131.92	131.92
Total	6,494.40	18,878.37	12,383.97

for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowance due the employee and remitted to that Board" (C.A. 91).

The third column total of $12,383.97 then is not only the amount which N&W claimed as an overpayment under the post-merger agreements, it is also, in most cases, the amount which the trainmen *had to repay the U. S. Railroad Retirement Board*, since the meager "temporary" benefit payments, in many cases, were not more than unemployment benefits paid these men under the Railroad Retirement Act.*

In most cases, then, the "temporary" benefit payments were utterly illusory, an absolute misnomer, since by delaying payments for 18 months many trainmen were forced to seek unemployment compensation which, in turn, had to be repaid from the "temporary" benefits *once they were finally paid the paltry sums which N&W alleged were due some 18 months after the merger*. The absurdity of this result, of course, is that the trainmen were not only virtually denied compensation protection but *were required* to pay back unemployment compensation they had already received.**

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* As the Court will note, the total temporary benefit payments to the 25 trainmen listed amounted to $18,878.37 or less than $1,000.00 per man for a period covering nearly 18 months from the effective date of the merger.

** Petitioner cites the case of R. N. Nemitz at p. 44 of its brief. Nemitz is one of the four trainmen not included on Exhibit "C" as attached to the March 3, 1967 letter and whose claim was allegedly "held in abeyance for further information and consideration." (A. 151). Nemitz alleges that he was paid only $1,689.61 in benefits rather than the $10,696.87 which the pre-merger agreement called for. At that Nemitz was, ironically, far better off than the remainder of the junior trainmen who, in net effect, ended up with much less than the $1,689.61 in net benefits which Nemitz received for the 18 months period in question. As the list at p. 31 shows the closest trainman to Nemitz in net benefits was G. M. Swain at $1,319.63.

Thus, it was not until nearly three years had elapsed from the merger, during which time Local Chairman Fitz had tried every avenue open to him to get benefits promised by the pre-merger agreements paid, that Local Chairman Fitz despaired of getting effective help short of litigation; and then it was probably the announcement by N&W on March 3, 1967, that it was going to actually worsen the junior trainmen's financial difficulties by requiring employees to reimburse the Railroad Retirement Board from the meager benefits which were eventually paid which finally precipitated litigation.*

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* The effect of N&W's position on the trainmen is described by Local Chairman Fitz and shows that in some cases N&W actually took alleged reimbursements due out of the regular paychecks of the men once they *did get back to work*:

"Q. Did you tell Mr. Yancey that you would not settle on this basis?

A. I think I got a commitment out of Mr. Yancey when they started talking about taking money out of every payment. I thought I had a commitment from him that he would not try to recover anything under the Letter of Understanding until we had time to further try to resolve this thing, and he agreed—he turned right around and combined those payments, and when I got back to Sandusky I had to explain to my people why they were short $10 or $20 in their paycheck, and I couldn't explain it.

I left Roanoke with the idea that they would not touch these checks." (Fitz deposition, p. 72).

"* * * I got McNeel to write a letter and told them that for God's sake, whatever you do, don't mess with the regular paycheck, because they went and combined this money with their regular paychecks, and then they started deducting, and they took their regular payday money away from them, and in one case this man had over $200 and some coming, and when he got the check it was for $1.56, so this was the point where I decided Roanoke and the N and W personnel down there didn't intend to deal in good faith, and I started to seek relief and some remedy, * * *" (Fitz deposition, p. 69).

SUMMARY OF ARGUMENT.

The first two sentences of Section 5(2)(f) of the Interstate Commerce Act require the Interstate Commerce Commission, as a prerequisite to approving a transaction under Section 5(2), to impose protective conditions, for the benefit of railroad employees affected by the transaction. The Supreme Court has interpreted the first and second sentences of Section 5(2)(f) as imposing a mandatory obligation upon the commission in all Section 5 transactions to "observe the provisions of the second sentence of Section 5(2)(f) as a minimum protection for employees adversely affected."

The last sentence of Section 5(2)(f) provides that "Notwithstanding any other provisions of this Act" the carrier and the representatives of the affected employees may enter into a collective bargaining agreement pertaining to the protection of the employees. Where collective terms have been agreed upon which meet the minimum protection required by Section 5(2)(f), the Commission has consistently fulfilled its mandatory duty to require a minimum level of employee protection by adopting such agreed upon terms in its order of approval. By doing so the Commission has not only acted in consonance with the scope of its duties, as defined by the Supreme Court and by past administrative practice, but has carried out the clear understanding of its duties held by both railway labor and management since the enactment of Section 5(2)(f).

In the instant case, the Commission's contention, that it did not incorporate in its order the pre-merger third sentence agreement of the parties, is contrary to the understanding of the parties themselves at the time of the transaction, and at odds with the language of the pre-merger agreements and the Commission's order. Moreover, if the

Commission did not incorporate the instant pre-merger agreement in its order by explicit adoption, that agreement was, nevertheless, included in the order by operation of law. Without incorporation of pre-merger agreements in Section 5 transactions, primary policy objectives of both the Interstate Commerce Act and the Railway Labor Act would be defeated. The legislative history of Section 5(2)(f), as well as the language of the Interstate Commerce Act, show that Congress intended that the Commission both review the adequacy of, and incorporate in its order, the terms of third sentence pre-merger agreements.

Alternatively, if the Court finds that the pre-merger agreement was not incorporated in the Commission's order, the record establishes that the N&W, after the merger, purported to make an agreement which, on its face, would destroy all meaningful compensation protection for adversely affected plaintiffs agreed upon at the pre-merger stage. Such purported agreement clearly fails to meet the requirement of Section 5(2)(f) that an agreement dealing with employee merger protection must be an "agreement pertaining to the protection of the interests" of affected employees, and is, therefore, violative of Section 5(2)(f) of the Act.

If the pre-merger agreement was incorporated in the Commission's order, the District Court had jurisdiction to enforce that order. If the pre-merger agreement was not incorporated in the order, the benefit destroying post-merger agreement violated Section 5(2)(f) and gave rise to a cause of action for damages, costs, and attorney's fees under 49 U.S.C. Sections 8 and 9.

If the pre-merger agreement was incorporated in the Commission's order, the record is clear that the post-merger agreement, on its face, abrogates employee merger protection without giving the slightest quid pro quo. The

courts below, therefore, were justified in holding that the post-merger agreement in question was unenforceable as a matter of law.

Finally, the record is overwhelmingly clear that the trainmen did everything reasonably possible to exhaust their administrative remedies. Further, unless the need for insuring prompt relief for adversely affected employees in the aftermath of rail mergers is to be disregarded, the "may" language in the arbitration clause, in a case like the instant one, should be deemed "optional" until such time as either party invokes arbitration. Since the evidence is uncontradicted that the plaintiffs attempted use of the contract remedy, and that neither the union nor the railroad effectively invoked arbitration for nearly three years, the courts below were correct in finding that the trainmen were not barred from suing by any failure to exhaust their administrative remedies.

ARGUMENT.

I. A FREELY NEGOTIATED AGREEMENT ON EMPLOYEE PROTECTION REACHED UNDER THE LAST SENTENCE OF SECTION 5(2)(f) OF THE INTERSTATE COMMERCE ACT WHICH MEETS THE MINIMUM PROTECTIVE REQUIREMENTS OF THE FIRST AND SECOND SENTENCES OF THAT SECTION BECOMES PART OF THE COMMISSION'S ORDER BY OPERATION OF LAW REGARDLESS OF WHETHER OR NOT THE COMMISSION EXPLICITLY INCORPORATES THE TERMS OF THAT AGREEMENT IN ITS ORDER.

This case raises the question of the scope of the Interstate Commerce Commission's responsibilities under Section 5(2)(f) of the Interstate Commerce Act; or more precisely, the question of whether a collective agreement on employee protective conditions reached pursuant to the last sentence of Section 5(2)(f) relieves the Commission of all responsibility under that section for assuring that a fair and equitable arrangement is reached to protect the interests of the railroad employees affected by Section 5(2)(f) transactions. The railroad, with the support of the Commission, contends that because employee protective conditions here derive from an agreement negotiated pursuant to the last sentence of Section 5(2)(f), the Commission had no responsibility to review it, did not review it, did not adopt it in its order and, hence, the District Court erred in assuming jurisdiction under 49 U.S.C. Sections 8 and 9.

The question of the scope of the Commission's duties where protective conditions are collectively agreed upon appears to be one of first impression. It comes before this Court by a tortuous route. The District Court did not have before it the question of the effect of a last sentence

collective agreement on the scope of the responsibilities of the Commission for employee protection under 49 U.S.C. Section 5(2)(f). The N&W admitted in its answer that the pre-merger agreement in question *had been incorporated in the Commission's order of approval* (A. 37). It contended, however, that the pre-merger agreement justified its position that employee merger benefits should be calculated on the basis of Sandusky Line earnings, regardless of how little monetary protection this would afford affected employees. The District Court framed the issue this way:

> "Basically, the N&W claims that it has an agreement pursuant to the last sentence of 49 U.S.C. Section 5(2)(f) providing for the determination of protective benefits on the basis of plaintiffs' Sandusky Line earnings alone. Plaintiffs, the employees represented by the Brotherhood of Railroad Trainmen, claim that they are entitled to payments based upon their earnings for the entire Toledo Division prior to the merger." (A. 49).

The District Court discerned that if N&W's position was correct, the adversely affected trainmen would be left virtually without compensation protection; that if the trainmen were to be protected to the extent of their pre-merger "average monthly compensation" for the 12 months before the merger, it would be necessary, despite the fact that N&W's acquisition split their seniority district, to determine this "average" from earnings for their entire pre-merger seniority district for this 12 months period. Notwithstanding this fact, the District Court noted that its function was not to review the Commission's order; that if "defendants position that protective benefits are to be calculated on the basis of Sandusky Line earnings alone is frozen into the I.C.C. order . . . (is correct,

this would) . . . divest this court of jurisdiction.*" (A. 52). *The court found, however, that the pre-merger agreement, in fact, "provided for determination of the average monthly compensation of the employee for the last 12 months before the merger in which he performed service and supplementing monthly earnings each month to reach that amount."* (A. 48). In light of this finding, the court described its function as requiring it to "delineate the minimal requirements of the law and the I.C.C. order in a situation where defendant's conduct with respect to protective benefits guaranteed plaintiffs has not been in compliance with the law or the I.C.C. order. But the function of the court is not to go beyond requirements of the law and the reason it finds noncompliance with the law." Regarding the language in the pre-merger agreement which seems to promise the trainmen "employment" as well as "compensation" protection (A. 67), the court said: "The court, however, will construe this *in the light which provides the least coverage*, noting that the language of 49 U.S.C. Section 5(2)(f) only speaks of employment but the term as therein used has been used to cover both employment and compensation." (A. 54).

The District Court, therefore, simply undertook to determine the minimum level of protection required by the first and second sentences of 49 U.S.C. Section 5(2)(f) *in a case where protection derived from a third sentence agreement admittedly incorporated in the Commission's order.* After a careful review of the Supreme Court's

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* The court footnoted its reason for this conclusion as follows:

> "Cases to review an I.C.C. order pursuant to 28 U.S.C. Sec. 1336 must be brought by or against the United States, 28 U.S.C. Section 2322, and must be filed within 90 days after the date the Commission order becomes final, 28 U.S.C. Sec. 1336(c)."

interpretation of the first and second sentences of Section 5(2)(f), the District Court was "compelled to the conclusion that 49 U.S.C. Section 5(2)(f) requires a wage freeze for four years after the consummation of the merger as the minimum protective benefits." (A. 51). Since the pre-merger agreement, construed most favorably to the defendant, provided for at least a four year wage freeze, and since there was no dispute that substantially less than that had been paid, the court found jurisdiction to enforce the Commission's order under 28 U.S.C. Sections 1331, 1336, 1337, 2321 and 49 U.S.C. Sections 8 and 9.

On appeal the N&W contended for the first time that the Commission had not adopted the protective conditions of the pre-merger agreement in its order; that the trainmen's rights flowed solely from collective agreements which the District Court lacked jurisdiction to enforce. The Court of Appeals rejected this contention as unsupported by the record before it and as contrary to law. It noted that incorporation was admitted in N&W's Answer; that "all interested parties entered into a 'Stipulation and Agreement'" before the Commission, which provided that the provisions of the 1962 agreement "shall be applied for the protection of the interests of the employees * * * as required by Section 5(2)(f) of the Interstate Commerce Act * * *;" "* * * that all parties understood that the provisions relating to benefits for affected employees in the 1962 agreement would be, and were, incorporated into the I.C.C. order; and that 49 U.S.C. Section 5(2)(f) imposed a duty on the Commission to assure the existence of "a fair and equitable arrangement to protect the interests of the railroad employees affected."

The Appeals Court, however, recognized that the Commission's duty was not to intrude gratuitously on

the efforts of railroad and union to achieve agreement on protective conditions, but merely to assure that the conditions were adequate within the purview of Section 5(2)(f). It thus found that "the I.C.C. first determined that the protective conditions in the 1962 agreement were adequate and then concluded that it did not deem itself compelled to elaborate on these conditions, merely stating that the conditions were subject to the order . . . . We find that the 1964 order in disclaiming the necessity for protective conditions, must be construed as meaning that such conditions need not be spelled out or elaborated in the 1964 order since they were sufficiently covered by the 1962 agreement, a construction which is consistent with the theory of incorporation as well as with the I.C.C.'s statutory duty." (A. 185-186). The Courts' conclusion respecting the incorporation question was, therefore, founded upon conclusions of both fact and law, and only tangentially and impliedly considered the effect of a third sentence Section 5(2)(f) agreement on the scope of the Commission's duties under that section.

When N&W petitioned this Court to grant certiorari, the Commission for the first time intervened as amicus curiae, and urged the granting of the writ on the grounds that the pre-merger agreements were not adopted in its order; that "for thirty years the consistent administrative interpretation of the third sentence has been that an agreement between rail labor and rail management moots the question of employee protection in a Section 5 proceedings," and, therefore, the courts below erred with respect to the scope of the commission's statutory duties.

In their briefs on the merits, N&W and the Commission have placed heavy reliance on the legislative history of Section 5(2)(f) which, it is contended, shows that congress intended to relieve the Commission of any duty to

review employees protective conditions where conditions were reached by collective agreement under the third sentence of Section 5(2)(f); that the rulings below would require the Commission to "review the adequacy of negotiated agreements" thereby intruding on traditional collective bargaining processes; and, since the "Commission did not review the (pre-merger) agreement in light of Section 5(2)(f) and did not adopt it," the District Court did not have jurisdiction of plaintiffs' action.

Apparently, therefore, the Commission's belated intervention has substituted for the question of whether the first and second sentences of 49 U.S.C. Section 5(2)(f) prescribes a minimum level of compensation, the question of whether collectively agreed upon employee conditions relieve the Commission of all responsibility for employee protection, much less for assuring the existence of a statutory minimum. It is the trainmens' contention that appellants' position is contrary to the legislative history of Section 5(2)(f) as well as administrative and judicial interpretations of that section; that this position, if adopted, would undercut compelling objectives of both the Railway Labor Act and Interstate Commerce Act; and that even if appellant's position is sustained on this narrow question, the record establishes at least one alternative basis for federal jurisdiction over this dispute, which the District Court never reached because of N&W's admission that the pre-merger agreement was incorporated in the Commission's 5(2)(f) order.

A. Section 5(2)(f) on its face, as well as the administrative and judicial interpretations of that section, reveal that this section imposes upon the commission a duty to assure that employees are at least protected to the extent of the compensatory minimum established by the first and second sentences of that section.

The trainmen agree with the Commission's implied suggestion that Mr. Justice Frankfurter's aphorism that "words acquire scope and function from the history of events which they summarize,"* seems an apt keynote in undertaking the task of determining congress' intent in enacting Section 5(2)(f). Trainmen doubt, however, that Mr. Justice Frankfurter meant to fault an approach which first looked carefully at the "words" themselves before traveling the paths of legislative history in search of "scope and function," especially where this Court has reviewed that legislative history and concluded that "it would not be productive to relate in detail the various statements offered by members of the house to explain the significance of the events outlined above. It is enough to say that they were many, sometimes ambiguous and often complicated." 336 U.S. 174, 175.

The first sentence of Section 5(2)(f) provides that "[a]s a condition of its approval [of a rail merger] * * * the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence provides that the order of approval "shall include" certain minimum employee protective conditions—protection for at least four years against "being in a worse position with respect to their employment * * *." The third sentence—the effect of which is in question in the instant case—provides that

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* *Phelp's Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 186.

"[n]otwithstanding any other provisions of this act, an agreement *pertaining to the protection of the interests of said employees* may hereafter be entered into" between the carrier and its employees' representatives. This Court is now asked to hold that the first and second sentences impose a duty on the Commission to assure employee protection where none is agreed upon, and provides it with a minimum standard in the exercise of this regulatory duty; and that a third sentence agreement renders the first two sentences utterly inapplicable. The trainmen submit that the wording of Section 5(2)(f) itself shows that such an interpretation is inherently incongruous and contradictory.

To begin with, it is meaningless to talk of employee protection without also talking about reasonably enforceable standards. Appellant's position apparently is that the carriers and unions are to set their own standards by determining which agreements "pertain to the protection of the interests" of employees, if indeed a proviso that vague, standing alone, can rationally be deemed a standard. At any rate, such a vague test is likely to be meaningless so far as employees most likely to need protection are concerned. If the union and railroad make an agreement which seriously a dislocated employee or employees believe does not "pertain to the protection of their interests," and if their rights stem solely from the agreement, as appellant and the commission contend, what is their remedy? They would have no basis for seeking a judicial review of the I.C.C. order pursuant to 28 U.S.C. Section 1336, since their rights, presumably, would not stem from the order. Are they left with their remedy under the agreement, namely, arbitration? If so, they would be asking the parties who negotiated the agreement to arbitrate its adequacy and fairness. If the union refused to invoke arbitration, as it might well do, what remedy would the em-

ployee have?; and if the union agreed to arbitrate the question of the adequacy of its own agreement, and conscientiously pressed the employees' grievance, what standard would the arbitrators use in determining whether the protection agreed upon was adequate? If the arbitrators found the protection inadequate, would they have the power to set adequate protection which would be judicially enforceable in the event the carrier refused to comply with its findings; and what would be the position of the adversely affected employees while protracted arbitration was in process? Would they not be likely to be without compensation at the time they most needed it—hardly the result envisioned by congress when it enacted Section 5(2)(f). The foregoing are only a few of the questions left suspended in the air by appellant's position with respect to the effect of a Section 5(2)(f) third sentence agreement on the Commission's duty under that section.

By the way of contrast, the reading given Section 5(2)(f) by the lower courts recognizes the logical interplay of all three sentences of the section, and gives a meaning and scope to the words which at least recognizes the elementary purposes of the section and the underlying realities to which it applies. Thus, the courts below read Section 5(2)(f) as giving to railway labor and management a virtually free hand in agreeing upon protective conditions, subject only to review by the Commission in order to assure that agreed upon terms meet the minimum protective standards of the first and second sentences of that section. This reading recognizes the concrete realities likely to surround third sentence agreements both at the pre-merger and enforcement stages. At the pre-merger stage, the intrinsic nature of many Section 5 transactions will find at least some employees—often the weakest within the unions political structure—in the poorest position

to exert influence upon union leadership so as to assure themselves adequate protective conditions. The danger that interests of politically weak employees might be sacrificed, in return for more favorable terms for politically stronger employees, seems obvious. This danger is at least controlled, if not eliminated, by assuring that *third sentence agreements comply with the minimum protective standards of the first and second sentences of Section 5(2)(f)* under pain of Commission disapproval of any agreement which falls short of the statutory minimum.

Furthermore, unless the timely enforcement of at least the basic protective terms collectively arrived at is assured, the protective purposes of Section 5(2)(f) might well prove illusory to employees who most need protection at the post-merger stage. The case at hand illustrates the point. Here the railroad, after the merger, claimed that the trainmen were entitled to protection approximately, if coincidentally, equivalent to what they were entitled to by way of unemployment compensation. Their union either mistakenly agreed with the railroad or temporized so long that it might as well have agreed with the carrier—there was no practical difference to the trainmen in either case. Moreover, the acquisition of Sandusky Line not only split the trainmen's seniority district, it resulted in their lodge and the lodge at the other end of the Sandusky Line at Columbus being the only two lodges made up of N&W employees in a General Committee consisting of some 53 lodges, most of which are made up of Pennsy employees.* After three years of painstaking efforts to get some action on their claims, the trainmen were still uncompensated

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* It is interesting to note that throughout the course of this dispute—a period of nearly 3 years—the letterhead on the stationery from the Union's General Committee was never changed to reflect the fact that N&W employees were represented by that committee.

under the terms of the 1962 agreements. Their only practical avenue of redress was to the courts.

The courts below, implicitly at least, recognized these hard facts; their rulings, if affirmed, would assure that the question of whether the most vulnerable employees, in fact, receive at least the statutory minimum protection, will not be left to either the vagaries of chance or the passing experiences of internal union politics. Collective bargaining is thereby left free to function, limited only by a minimal standard aimed at preventing the bargaining process from becoming an instrument for defeating a cardinal objective of Section 5(2)(f)—fair and equitable protection for all affected employees. This minimal restraint on the processes of collective bargaining also impliedly recognizes that suppositions about the collective bargaining process, which may be valid in periods of normality, cannot be blindly accepted as likely to obtain in periods of internal political upheaval likely to attend Section 5 transactions. In this context, to stop short surrendering to the collective bargaining process absolute regulatory power over employee protection, by preserving a minimum of supervisory responsibility in the Commission at the pre-merger stage, and in the courts at the post-merger stage, is simply to accommodate the objectives of both the Interstate Commerce Act and Railway Labor Act in rational and fair way.

The alternative suggested by appellant would create two mutually exclusive protective and remedial schemes. The first, based upon the first and second sentences of Section 5(2)(f), would be operative only in cases where protective terms could not be agreed upon. Employees protected in this event would be assured at least the statutory minimum of protection by Commission order. If the

carrier refused to comply with that order, the employees would presumably have available to them the full range of remedies under the Interstate Commerce Act, including the right to damages under Section 9, costs and attorneys fees under Section 8, and even swift injunctive relief under Section 16 (12). The second scheme, as shown above, would be, at best, a labyrinth of uncertainty in which financially distressed employees might be faced with the equally grim alternatives of accepting what was given them, abandoning hope of fair protective conditions, or suing their own union for breach of its duty of fair representation. The absence of any reported case holding, or even suggesting, that congress intended to create such an unpredictable dual scheme of protection by enacting the third sentence of Section 5(2)(f) is some, if not conclusive, evidence of the unworkability and unfairness of such a dual and contradictory scheme.

The Commission has argued that since Section 5(2)(f) was revised to facilitate mergers at a time when nearly one-third of the nation's railroads were in receivership, carriers and unions could not have contended and congress could not have intended that the Commission would have to review the adequacy of third sentence agreements. To support its point, *the Commission hypothecates* a case where a financially troubled carrier agrees with the union "for employee protection of three instead of four years as provided in the second sentence of Section 5(2)(f)." The Commission concludes that under the lower courts decision it would, in this situation, have to review the adequacy of the agreement and require four years protection which might force the carrier to shut down to everyone's detriment (Commission brief, pp. 24-25).

Surely this argument proves too much. If the carriers and union can agree to three years protection, they can

agree to protection for two, or one, or no years as well; and if they can agree to less than four years protection when a carrier is in financial difficulty, they can agree to less than four years protection for some employees where a carrier is in a strong financial position and where the union leadership is willing to trade off the interests of a weak, dislocated minority in return for concessions to the unaffected majority in areas, for example, such as job security or working conditions. As shown above, unless the Commission reviews such agreements as to their fairness and adequacy, and unless such agreements are made part of the Commission's order, either by explicit adoption or by operation of law, there simply will be no practicable redress available in some cases for employees whose vital interests are sacrificed.

Moreover, the Commission's reading of the legislative history of Section 5(2)(f) is at variance with the interpretation given that history by this Court. The Supreme Court carefully reviewed this history in *Railway Executives Asso. v. United States*, 339 U.S. 142 at 148-154 as follows:

> "The legislative history of § 5(2)(f) shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations. In 1938, the President appointed a Committee of Six to consider the transportation problem and recommend legislation. It was composed equally of representatives of railroad management and railroad labor. They endorsed the Washington Agreement and recommended amending § 5 of the Interstate Commerce Act so as to include the following:
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> 'After the details of any proposed consolidation have been determined by the interests involved, they should be embodied in an application for approval, addressed to the Transportation Board. In passing

upon such an application, the Board should be governed by the following considerations:

* * * * *

'(*d*) The interests of the employees affected. The Board shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees.'

March 30, 1939, Senators Wheeler and Truman introduced S 2009, which, in § 49(3)(c), contained substantially the above language:

'The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.'

"In the meantime, the House of Representatives considered a comparable bill, HR 4862, introduced by Representative Lea. Extended hearings were held. On the issue before us, this bill contained the same language as did the Senate bill. It required, as a prerequisite to the Commission's approval, 'a fair and equitable arrangement to protect the interests of the employees affected.' When S 2009 reached the House, the Committee in charge of it struck out everything after the enacting clause, substituted the text of the House bill and recommended its passage. In it, the provision in question took the form of an amendment to § 5 of the Interstate Commerce Act.

"If this provision, which later became the first sentence of § 5(2)(f) now stood alone as it did then, the Commission unquestionably would have power to grant at least as much relief to employees as it had under § 5(4)(b). The crucial question is whether the second sentence of § 5(2)(f), which was inserted soon thereafter, amounts not only to an additional provision for the protection of labor, but also to a limitation upon the discretion vested in the Commission by the first sentence.

"The second sentence of § 5(2)(f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:

'*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.'

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

"With the Harrington Amendment in it the bill went to conference. It came out with all provisions relating to consolidations under § 5 eliminated. The House, however, recommitted the bill to conference with instructions to insert a modified form of the first sentence of § 5(2)(f), together with a modified form of the Harrington Amendment. The modification of the first sentence merely extended the original language as to fair and equitable arrangements so as to include abandonments as well as consolidations. The modification of the Harrington Amendment is not now material.

"The second conference reported § 5(2)(f) in the final form in which it was enacted into law. It retained the first sentence in its original language. In the second sentence, however, it included a substantial change in the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order

of approval. This clause emphasized the separability of the second sentence, for it provided that "the protection afforded to any employee pursuant *to this sentence* shall not be *required* to continue for a longer period, . . ." than that prescribed. (Emphasis supplied. See p. 145, supra, for full text of the clause.)

"The second sentence thus gave a limited scope to the Harrington Amendment and made it workable by putting a time limit upon its otherwise prohibitory effect. There was no comparable need for such a restriction upon the first sentence. We find, therefore, that the time limit in the second sentence now applies to it and to it alone. As thus limited, that sentence adds a new guaranty of protection for the interests of employees, without restricting the Commission's power to require greater protection as part of a fair and equitable arrangement. This serves the purpose of the sentence to increase, rather than to decrease, the protective effect of the paragraph. . . .

"We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation."

Despite this Court's unqualified conclusion that one of the principal purposes of Section 5(2)(f) "was to provide *mandatory protection for the interests of employees affected by railroad consolidations*," and that the Commission is "*required to observe the provisions of the second sentence of Section 5(2)(f) as a minimum protection for employees adversely affected* * * *," this Court is now asked to hold that the third sentence of Section 5(2)(f) renders the requirements of the first and second sentences utterly inapplicable; that the third sentence

relieves the Commission of any responsibility to assure the existence of any protection at all much less a mandatory minimum. Trainmen submit that this argument ignores this Court's reading of Section 5(2)(f) in *Railway Labor Executives Asso. v. United States.*

B. Legislative history and past administrative practice.

Furthermore, the suggestion that railway labor, by seeking the inclusion of the third sentence of 5(2)(f), intended to negate the operation of the first and second sentences in cases where protection is agreed upon, is at odds with the sense of the pertinent legislative history. As the Commission has noted, at the time Section 5(2)(f) was enacted in 1940 the Washington Job Protection Agreement, which called for five years of compensation protection, had approximately one year to run, and was thereafter to continue in effect except that a union or carrier could withdraw one year after notice. If railway labor intended in this context that the third sentence was to mean what N&W and the Commission suggest, it would mean that it was in the peculiar position of deliberately seeking to weaken its own bargaining position in cases where agreement on protective conditions was sought. For instance, if the first and second sentences of Section 5(2)(f) are to have no application in cases where protective conditions are collectively agreed upon, the railroad and union would in these cases start from a position which presupposed no obligation to meet any mandatory minimum level of protection; and a carrier signatory to the Washington Agreement would simply have to give notice of its withdrawal from that agreement in order to put itself in a position where it would be bargaining for merger conditions under a standard no more definite than that contained in the third sentence, with the realization that if

no agreement could be reached the Commission would probably impose conditions consistent with the statutory minimum.

A more logical reading of this legislative history is that railway labor, realizing that the effective period of the Washington Agreement was about to expire, saw and welcomed the first and second sentences of Section 5(2)(f) as creating a mandatory minimum floor of protection, roughly equivalent to that contained in the Washington Job Protection Agreement, which would permit the unions to bargain upward for more favorable protective conditions where it was possible to obtain them. Read in this light, the first and second sentences, rather than hamstringing industry attempts at democratically working out the problem of employee merger protection, actually promote agreements. It will surely be easier to reach agreement on employee conditions if both parties have before them a clear minimum standard which their bargaining efforts must meet, rather than bargaining with only the vague proviso contained in the "notwithstanding" clause before them. If Congress, which is obviously concerned with workable standards promotive of statutory objectives, expended so much effort in working out the contours of Section 5(2)(f), whose primary objective is employee protection, only to renounce any regulatory duty in cases where conditions were agreed upon, it seems slightly incredible that it would choose so tortuous and confusing a means of doing so.

Significantly, the position now taken by the Commission is contrary to past judicial and administrative definition of the power and duties conferred by Section 5(2)(f) on the Interstate Commerce Commission. *Railway Labor Executives Assoc. v. United States, supra,* established a floor of protection, allowing the Commission to impose a

"fair and equitable arrangement" for employee protection in excess of four years.

The meaning of the term "worse position with respect to their employment," in Section 5(2)(f) has been adjudicated. In 1960 the I.C.C. following many years of precedent, rejected the employees' contention that the section required a "job freeze," employment for a period of four years, rather than the monetary compensation in the past. *Erie-Lackawanna Merger*, 312 I.C.C. 185.

The I.C.C.'s position that the retention of unnecessary positions was unwarranted and the monetary compensation was sufficient to satisfy the requirements of the second sentence of Section 5(2)(f) was sustained in the Supreme Court. *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1960).

The Court's decision was grounded on two principal bases. First, the legislative history of the Transportation Act of 1940 revealed that a "job freeze" was not contemplated by Congress in the enactment of Section 5(2)(f) and secondly, such an interpretation of the legislative history was reinforced and confirmed by subsequent events.

The Court noted that since the statute was passed, the Commission had consistently *followed the practice of imposing compensatory protection in over 80 cases, with full support of the intervening unions and the Railway Labor Executives' Association.*

The Supreme Court summarized its position by saying:

> "In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of Congressional intent, to the extent they are ascertainable indicate that the ad-

ministrative interpretation is correct." *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. at 179.

This Court's reference to the Commission's imposition "of compensatory protection in over 80 cases" is significant here because in many of those cases the union and carrier *had reached agreement on protective terms and the Commission incorporated these agreed upon conditions in its approval order.* This fact is unequivocally acknowledged by the Commission in its brief as amicus curiae filed in *Clemens v. Central R.R. Co. of New Jersey*, 264 F. Supp. 551, reversed, 339 F.2d 825, certiorari denied 393 U.S. 1023 wherein the Commission stated:

> "It may be expected that it is more typical, where the unions and the railroads are able to agree upon the protection to be accorded employees, that agreement is generally reached during the course of the proceedings before the Commission. *Where employee unions and railroads have stipulated to a particular set of labor conditions, the Commission has consistently imposed such conditions for the protection of the union members.* E.g., *Gulf, M. & O. R. Co. Purchase, Securities*, 261 I.C.C. 405, 434 (1945); *Erie R. Co. Trackage Rights*, 295 I.C.C. 303 (1956); *Delaware, L.&W. R. Co. Trackage Rights*, 295 I.C.C. 743 (1958). In some cases, the Commission *has adopted such stipulated conditions for employees whose union signed such agreements even when it was of the view that different protection should be adopted for employees not represented in the stipulation.* See, e.g., *Wheeling & L. E. Ry. Co. Control*, 267 I.C.C. 163, 184 (1946); *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 235 (1947); *Detroit, T. & I. R. Co., Control*, 275 I.C.C. 455, 487 (1950); *Valdosta S.R. Purchase*, 282 I.C.C. 705, 711-12 (1952)" (A. 173.)

That the Commission has consistently reviewed pre-merger agreements respecting employee protection, was

dramatically borne out in *Florida East Coast Ry. Reorganization,* 307 I.C.C. 5 (1958). In this case the Interstate Commerce Commission rejected, as contrary to the public interest, an agreement *stipulated to by all parties which* "in effect, would guarantee all employees against loss of pay or seniority rights during their lifetime * * *." The district court for the Southern District of Florida, sitting as the reorganization court, accepted and approved the Interstate Commerce Commission ruling finding, "not an abuse of discretion, but the exercise of an enlightened discretion." *In the matter of Florida East Coast Ry.,* 171 F. Supp. 512, 519 (S.D. Fla. 1959). The Commission may have had cases like *Florida East Coast* in mind in stating that "although the 1962 agreement relieved the Commission of any duty to act under Section 5(2)(f), the Commission retained, and still retains under Section 5(9) of the Act . . . the power to supplement the protection afforded under Section 5(2)(f)." Section 5(9) provides: "The Commission from time to time, for good cause shown, may make such orders, *supplemental to any order made under paragraph (1), (2) or (7),* of this section, as it may deem necessary or appropriate." But the Commission has contended that it neither reviewed the pre-merger agreements in the instant case, nor *adopted these conditions as part of its order.* If the conditions were not made part of its order, it is difficult to understand how Section 5(9) could be the basis for supplementing employee protection *by supplementing the Commission's order;* and if the employee conditions in the present case were made part of the Commission's order, then the courts below had jurisdiction to enforce that order.

A more reasonable interpretation of the purpose of Section 5(9), as respects the Commission's duty under Section 5(2)(f), is that since, as the Commission notes,

"Section 5(2)(f) does not limit the Commission's authority to grant greater protection" than provided by that section, the Commission is to retain the discretionary authority to protect rail labor beyond the mandatory minimum required by Section 5(2)(f) if it finds the statutory minimum inadequate, whether or not conditions are agreed upon. This interpretation recognizes that the first and second sentences of Section 5(2)(f) expresses the congressional conclusion that *it is in the public interest to require the Commission to assure a mandatory minimum of employee protection in its orders approving Section 5 transactions;* that promised employee protection might be rendered practically meaningless in cases where a Section 5 transaction weakens financially distressed employees' position within the union, unless the affected employee can obtain reasonably prompt judicial enforcement of those protective conditions by enforcing the Commission's order. It is submitted that there is nothing inconsistent in granting the Commission the power to require a minimum level of protection, even in cases where the source of protection is a collective agreement, and permitting the Commission in the "public interest" and where good cause is shown, to either supplement these agreed upon conditions where it finds them inadequate, or to reduce them where it finds them excessive as in the *Florida East Coast* case.

C. Past understanding of railway labor and management regarding the scope of Commission's duties under Section 5(2)(f).

Not only is the Commission's position here inconsistent with its past practice under Section 5(2)(f), it is contrary to the clear understanding of that section's meaning long accepted by both railway labor and management.

The clearest possible expression of railway labor's understanding of the Interstate Commerce Commission's duty under Section 5(2)(f) is found in the Manual of Information and Instruction, Brotherhood of Railroad Trainmen, 10M—3rd Rev.—1962 at 139, 150 as follows:

> "Common carrier applications for acquisition of control over one or more other common carriers by railroad; and for consolidation, merger, or unification of two or more common carrier railroads; and for approval of trackage right agreements between two or more railroads, are filed with the Interstate Commerce Commission in accordance with the provisions of Section 5(2) of the Interstate Commerce Act. Such applications are also listed as Finance Dockets and must receive the approval of the I.C.C. before the carrier proposal can be placed into effect. The Congress of the United States recognized that employees of the carriers involved in such a transaction may be adversely affected and *made it mandatory upon the I.C.C., through enactment of the Harrington Amendment,* Section 5(2)(f), Transportation Act of 1940, *to prescribe terms and conditions for the benefit of employees adversely affected.* . . .
>
> "As previously stated in the article dealing with Acquisitions, Consolidations, Mergers, Etc., the Harrington Amendment is a *mandate upon the Interstate Commerce Commission to impose adequate terms and conditions for the benefit of employees adversely* affected in transactions coming within the purview of Section 5(2) of the Interstate Commerce Act, *and to accept and incorporate in its order of approval an agreement pertaining to the protection of the interest of employees entered into by and between the representatives of the carriers and the duly authorized representatives of the employees.*"

Trainmen submit that this clear understanding of their union that Section 5(2)(f) mandates a minimum level of

protection and requires the Commission to "accept and incorporate in its order of approval an agreement pertaining to the protection of the interest of employees" between railroad and union, is not only consistent with longstanding Commission practice as expressed in its brief amicus curiae in *Clemens* (p. 56 *supra*) but, more importantly, conforms with this Court's interpretation of Section 5(2)(f) in *Railway Labor Executives Assoc. v. United States supra.*

Finally, railroad management, where it has proved self-serving, has not hesitated to urge upon the courts the conclusion that the commission's duty is to include third sentence 5(2)(f) agreements in its order, so that a union refusal to comply with that agreement can be enjoined as a violation of the Commission's order rather than be dealt with as a dispute under the Railway Labor Act. This fact is most clearly demonstrated in the case of *Brotherhood of Local Engineers v. Chicago and Northwestern Ry. Co.*, 314 F.2d 424 (8th Cir.), Cert. denied, 375 U.S. 819 (1968).

Northwestern involved an action by the railroad against the unions for declaratory relief to enjoin the unions from invoking the "major dispute" procedures of the Railway Labor Act* in adjusting seniority rights of

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* These procedures are described by Justice Harlen in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company*, 394 U.S. 369 at 378 as follows:

"The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. Paragraph 6. The parties must confer, paragraph 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services sua sponte if it finds a labor emergency to exist. Paragraph 5 First. If mediation fails, the Board

(Continued on following page)

employees affected by consolidation of plaintiff's railroad yard with the newly acquired railroad yard. The railroad claimed that the matter should be settled under the arbitration clause in the Section 5(2)(f) conditions imposed by the commission. In *Northwestern,* as in the instant case, Section 5(2)(f) conditions were reached by agreement between the parties with the same stipulation entered into by the parties here, namely, that "the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employees as provided in Section 5(2)(f) of the Interstate Commerce Act." The union claimed that because the proposed coordination would work a change in pre-existing collective agreements, the "major dispute" provisions of the Railway Labor Act governed the proposed coordination.

In upholding the decision of the District Court requiring the union to arbitrate, the Appeals Court held that the prior agreement of the parties was adopted by the Commission in compliance with Section 5(2)(f), which requires the Commission to assure employee protection, and therefore the suit was to enforce a Commission order. In assuming jurisdiction and rejecting the union's argument that the Railway Labor Act governed the dispute, the court held that 49 U.S.C. Section 5(11) ex-

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(*Continued from preceding page*)

must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. Paragraphs 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. Paragraph 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. Paragraphs 2 Seventh, 5 First, 6, 10."

empted the railroad from the operation of the Railway Labor Act. In considering the question of how it should determine whether the case should be deemed to arise under the Interstate Commerce Act or the Railway Labor Act, the Court cited the test set forth in *Gulley v. First National Bank*, 299 U.S. 109, 112: "The right or immunity must be that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." The court concluded that "like the Harrington Amendment,* the Railway Labor Act, if it applied, would threaten to prevent many consolidations."

The trainmen submit that what the *Northwestern* Court said with respect to effect of applying the Railway Labor Act to the railroad's coordination efforts in that case, applies with equal validity to effect which might be created if employees in the position of the Sandusky trainmen cannot seek judicial enforcement of the protective conditions in pre-merger agreements. In *Northwestern*, of course, had the union's view prevailed, the railroad would have been faced with the costly and difficult prospect of exhausting the designedly protracted procedures for changing the pre-existing collective agreements in order to carry out the Commission approved coordination. Even after exhausting these lengthy procedures, there would be no guarantee that an agreement

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* The court was obviously referring here to the fact that the Harrington Amendment as initially introduced would have required that the Commission withhold approval if a transaction would displace workers, or impair their employment rights. 84 Cong. Rec. 9882 (1939). The Congress, of course, adopted a revised version of the Harrington Amendment by enacting the second sentence of Section 5(2)(f) which requires a minimum of four years protection during which [the] transaction will not result in employees of said carrier * * * being in a worse position with regard to their employment." 86 Cong. Rec. 5886.

between the parties could be reached, so that the railroad might well have faced the unhappy prospect of being met with a strike if—after major dispute procedures were exhausted—it decided to resort to self-help remedies by accomplishing the Commission approved coordination over union objection. This would place the coordination itself at the mercy of the outcome of economic warfare, as both parties utilized self-help remedies to coerce an acceptable agreement. In short, the Commission's approval of the coordination might have been thwarted at considerable cost to the railroad and probably at the expense of the public interest. The *Northwestern* court simply perceived this problem and decided the case on the belief that the overriding objectives of the Interstate Commerce Act required that it assume jurisdiction and grant swift declaratory relief to the railroad.

If what is sauce for the goose is sauce for the gander, then employees who are denied merger benefits, like carriers denied effectuation of an approved merger by obstructionist union tactics, should be accorded access to judicial enforcement of their rights in cases like the present one, unless assuring employee protection is to be discarded as a primary objective of 49 U.S.C. Section 5(2)(f). Moreover, it may prove to be manifestly in the public interest to assure the same avenue of redress to employees as was granted the carrier in *Northwestern*. A simple illustration will explain the point.

Assume for purposes of discussion that the Sandusky trainmen had been a numerically large and politically strong group of employees; and, that when N&W, several months after the merger, announced its intention to calculate their benefits on Sandusky earnings only, divided by 12, they had taken the position that this action would clearly change the very terms of their pre-merger agree-

ment in violation of the "major dispute" procedures of the Railway Labor Act; that in response to N&W's insistence upon using Sandusky earnings only the union had struck.

In this assumed situation, it seems safe to conjecture that the carrier would move immediately to dissolve the strike by injunction. In this situation the court would be required to accommodate the objectives of both the Railway Labor Act and the Interstate Commerce Act. In this context it could not fairly order the parties to arbitrate since the arbitration clause covers only minor disputes—those over mere matters of "interpretation or application" of the agreement—and here the dispute, if the Railway Labor Act were deemed applicable, would be "major." If it ordered restoration of the "status quo" under the Railway Labor Act, it would be in the anomalous position of ordering the railroad to continue paying merger benefits only until such time as it had exhausted protracted mediation procedures, during which period the railroad could seek an agreement which would reduce employee merger benefits, and at the conclusion of which both parties could resort to self-help remedies if an agreement were not reached. In this incongruous situation it is doubtful that the public interest in avoiding unnecessary strikes would be much better served than would the interests of adversely affected employees in receiving promised merger protection. Obviously, such an anomalous situation could not arise if the Railway Labor Act were simply deemed inapplicable and the employees were permitted to enforce their rights under the Interstate Commerce Act. The latter alternative simply recognizes that while the Railway Labor Act procedures may serve as an effective framework for regularizing and resolving industry disputes in the context of an ongoing, stabilized labor-

management relationship, it ill-serves the objectives of either the Railway Labor Act or Interstate Commerce Act in cases like *Northwestern* or *the one at hand*. The District Court recognized this fact and concluded:

> "While it is generally true that no two cases are exactly alike, and the *Northwestern* case when compared to the instant controversy is not an exception to that general rule, they are enough alike in all material respects that the case is authority for the plaintiff's position here on the question of jurisdiction." (A. 27).

Finally, we ask this Court to consider what N&W's response would have been had the unions in the instant case taken the position following N&W's takeover at Sandusky, that every change in rules or working conditions not specifically covered in the pre-merger agreement, would require N&W, in order to effect the change, to follow the "major" dispute procedures of the Railway Labor Act; that every attempted change was met with a strike threat. Is there any doubt that N&W would have moved swiftly, as did the carrier in *Northwestern,* for an injunction ordering the union to comply with the Commission's order by arbitrating any such dispute. Certainly N&W would have relied on *Northwestern* to show that 49 U.S.C. Section 5(11) relieved it of all restraints of the Railway Labor Act; that the *arbitration clause which is included in the pre-merger agreement was made part of the Commission's order;* and that the union's refusal to arbitrate the dispute was enjoinable as a violation of the Commission's order.

The point here is that the pre-merger agreements contained much more than an agreement on employee protective conditions. Since it would be totally illogical to argue that the Commission incorporated in its order all the provisions of the pre-merger agreement except

those dealing with employee protection, it follows that the Commission either adopted the entire agreement in its order or failed to adopt any part of it. If the Commission adopted no part of the pre-merger agreement, it would mean that, in practical effect, it left effectuation of this entire transaction subject to the union's option to invoke or waive its right to require strict compliance with Railway Labor Act in putting this transaction into effect. Had the union done in this case what the union did in *Northwestern,* however, trainmen doubt that the Commission would be here arguing that it did not adopt the pre-merger agreement in its order and, therefore, the parties *were not relieved of the restraints of the Railway Labor Act as* provided in 49 U.S.C. Section 5(11). By narrowing the gauge of their discussion to include only the question of employee protection, both N&W and the Commission have lost sight of the broader aspects of Section 5 transactions. All the trainmen are asking is that the interests of affected employees in receiving effective protection against the adverse effects of rail consolidations be given the same recognition and enforcement as a railroad's interest in seeing that a transaction is carried into effect.

In summary, Section 5(2)(f) on its face implies the necessity for Commission review at the pre-merger stage of third sentence agreements respecting employee protection, unless the "notwithstanding" clause is read as conferring upon railroads and unions unreviewable discretion to decide, ipse dixit, what constitutes adequate and fair protection. Moreover, this interpretation of Section 5(2)(f) would inevitably lead, at the post-merger stage, to cases where promised protection might prove cruelly illusory to employees most in need of protection, since dislocated employees would be left with no practical avenue of redress in cases where, for one reason or an-

other, their union refused or neglected to press their claim for enforcement of merger conditions. The Supreme Court's decisions in *Railway Labor Executives Association v. United States*, 339 U.S. 142, and *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, strongly suggest that this Court has interpreted Section 5(2)(f) as imposing upon the Commission a mandatory duty to assure that merger affected employees are effectively assured at least the minimum level of protection expressed in the second sentence of Section 5(2)(f). And finally, the past practice of the Commission itself; and the understanding of Section 5(2)(f) of both the unions and railroads, reflect a longstanding awareness that both the objectives of the Interstate Commerce Act and Railway Labor Act will best be served by the interpretation of Section 5(2)(f) urged by respondent. For these reasons, the interpretation of 49 U.S.C. Section 5(2)(f) belatedly urged by the appellant and the Commission should be rejected.

II. ASSUMING ARGUENDO THAT THIS COURT DECIDES THAT THE PRE-MERGER AGREEMENTS WERE NOT INCORPORATED EITHER EXPRESSLY OR BY OPERATION OF LAW INTO THE COMMISSION'S ORDER, THE COURTS BELOW WOULD HAVE BEEN REQUIRED, NEVERTHELESS, TO ASSUME JURISDICTION OVER THIS CONTROVERSY.

The courts below based their jurisdictional ruling on the assumption that the protective terms of the pre-merger agreement were incorporated in the Commission's order. The courts, however, also had before them a post-merger agreement—so called Implementing Agreement 1-A and a letter of understanding contemporaneously executed on October 25, 1965—which N&W claimed was a binding and enforceable collective agreement limiting the plaintiffs to

their remedies under the contract. The courts, of course, rejected this contention on the grounds that the post-merger agreement on its face substantially abrogated the basic employee protection called for in the pre-merger agreement, and therefore failed to meet the requirements of Section 5(2)(f) of the Interstate Commerce Act.

Had the District Court, however, been confronted with and accepted the Commission's contention that the pre-merger agreement was never incorporated in its order, the court would have been required to determine whether the post-merger conduct of the railroad and union, and the agreements themselves, gave rise to a basis for federal court jurisdiction. Trainmen contend that they did.

The third sentence of Section 5(2)(f) is certainly intended to cover agreements respecting employee interests in the wake of railroad consolidations, both at the pre-merger and post-merger stages. At the post-merger stage, however, it is hardly likely that Congress was simply telling rail labor and management that they could continue to bargain collectively. Since the Railway Labor Act is continuously operative in the context of rail consolidations except to the extent that 49 U.S.C. Section 5(11) makes the Interstate Commerce Act "exclusive and plenary," Congress must necessarily have intended the third sentence of 5(2)(f) to require that post-merger agreements dealing with matters of employee protection meet the standard set forth in the third sentence. If so, this case raises the question whether, assuming the Commission has not included collectively agreed upon protective terms in its order, an agreement entered into over a year after that order which negates those protective terms gave rise to an action under 49 U.S.C. Sections 8, 9 and 16(12). It is submitted that unless employees in this assumed situation can bring their claim for relief to the courts, the protective scheme of the

Interstate Commerce Act will inevitably become a meaningless and illusory promise to some merger victims most in need of protection. The instant case demonstrates the point.

The record shows that while the trainmen were in "dire need of money" during the first post-merger year, the railroad stalled in making benefit payments alleging delay in getting the needed earnings records from the Pennsy. Under extreme pressure from the trainmen affected, union and management on October 25, 1965—a year and ten days after the merger—entered into agreements which N&W eventually claimed limited total benefits due to slightly more than what had already been paid by way of unemployment benefits. Thus it was not until more than a year after the merger that N&W had even an arguable basis for denying the trainmen the compensation protection promised in the pre-merger agreement. By temporizing in the matter of protection N&W, thereby, foreclosed the trainmen from seeking at least one remedy which they could have chosen had they had any reason to suspect that a post-merger agreement destroying their basic merger protection would be entered into. Cases to review an Interstate Commerce Commission order pursuant to 28 U.S.C. Section 1336 must be brought by or against the United States, 28 U.S.C. Section 2322, and must be filed within 90 days after the date the Commission's order becomes final, 28 U.S.C. Section 1336. Thus, even if it is assumed that the Commission need not incorporate collectively agreed upon conditions in its order, there would be no reason why it *could not do so before or after the merger, in a case where the practical exigencies of a given case required it to do so in order to effectuate the objectives of the Act.* For instance, if it became clear in the immediate post-merger stages that adversely affect-

ed employees would be placed in the intolerable position which the trainmen found themselves following the instant merger unless they were permitted swift access to the remedial scheme embodied in 49 U.S.C. Sections 8, 9, and 16(12), it would seem that an appropriate avenue of relief would be to sue for an order to review the Commission's order for the purpose of showing that protection might be practically denied unless the Commission were ordered to include the agreed upon protection in its order.

In the instant case, the trainmen were not only confronted with three years of temporizing, they were first notified that the Commission did not deem itself to have ordered any employee protection when they were in the United States Supreme Court. If victimized employees would have the right under the statutes noted to seek an order requiring the Commission to order employee protection in an appropriate case, are employees to be denied effective means of assuring enforcement of merger conditions in a case where through no fault of their own they are led to believe for more than 90 days after the Commission's order that they are to be fairly and adequately protected. Trainmen contend that the third sentence of Section 5(2)(f) does not permit rail management and labor to do at the post-merger stage what they could not do at the pre-merger stage, namely, to repudiate the need for "a fair and equitable arrangement to protect the interests of the railroad employees affected" by a Section 5 consolidation. Even assuming that the Commission *did not incorporate the pre-merger terms in its order*, it is clear from the order itself that it satisfied itself that the agreement met the minimum requirements of Section 5(2)(f). Unless politically dislocated merger victims are afforded the minimum protection of Section 5(2)(f), their rights can easily become a mere "bargaining chip" in the post-

merger dealings of the railroad and union. Furthermore, unless the minimum level of protection required by the first and second sentences is assured them, it will prove all too easy to eliminate compensatory protection in exchange for an allegedly "greater good" determined by those whose interests may be basically opposed to those of the employee victims. The record at hand illustrates the problem.

N&W has gone to great lengths to show that the post-merger agreement did not "abridge any rights previously vested" in the trainmen and, in fact, gave them valuable additional benefits not provided for in the pre-merger agreement. As will be shown below, however, the post-merger agreements took away all meaningful protection provided for in the pre-merger agreement and, in return, "certified" that the employees whose protection had been destroyed were "adversely affected." It seems safe to conjecture that the trainmen who had been living on unemployment compensation for a year knew that they were "adversely affected" at the time the post-merger agreements were made.

It is significant that despite the patent absurdity of N&W's position that the post-merger agreement, as construed by the railroad, really was in the employees interest, their union did nothing to effectively advance their claim for relief. As the months stretched into years the compensation protection promised in the pre-merger agreement became a more and more hollow promise. Simply put, what had occurred was that the pre-merger agreements which the Commission found to be "in conformity with Section 5(2)(f) of the Act for the protection of the covered employees," (A. 197) were virtually ignored by the parties as far as this most seriously affected band of Sandusky trainmen were concerned. Having done, as the

court below found, everything possible to exhaust their internal remedies, these men were forced into a position of choosing between abandonment of their claim or suing.

The point here is that had the trainmen chosen to sue on the basis that the post-merger agreement patently did not "pertain to the protection of (their) interests," as required by the third sentence of Section 5(2)(f), they clearly had the right to do so under 49 U.S.C. Sections 8 and 9.

Section 8 provides:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with reasonable costs and attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, Sec. 8, 24 Stat. 382; Aug. 9, 1935, c. 498, Section 1, 49 Stat. 543."

Section 9 provides in pertinent part:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaints to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case

elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

Had the trainmen chosen to sue on the basis of the post-merger agreements alone, the issue presented would have been as follows: did the "common carrier . . . do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful. . . ." If post-merger agreements must "pertain to the protection of the interests" of affected employees, it seems too obvious to remark that a post-merger agreement which does not protect basic employee interests but, rather, abrogates protection promised in Section 5(2)(f), is an act "declared to be unlawful in this chapter," and is actionable under Sections 8 and 9.

Because incorporation of the pre-merger agreement was admitted, the District Court simply dealt with the question of whether, assuming jurisdiction existed because of incorporation, a post-merger agreement which "abrogates" employee protection is enforceable as a matter of law. Hence the court was never asked to decide whether, in addition to the question of its enforceability, such an agreement entered into by a carrier would give rise to an action for damages, costs and attorneys fees under 49 U.S.C. Sections 8 & 9.

Petitioner may argue that the question of whether a post-merger agreement "pertains to the protection of the interests" of affected employees is a question which should be left to the processes of the Railway Labor Act. Such an argument, however, fails to touch down on hard reality for several reasons: The only conceivable avenue for an employee to use in challenging a third sentence agreement affecting basic monetary protection promised under Section 5(2)(f) would be the "minor" dispute procedures of the Railway Labor Act; in other words, the

channel for pressing grievances stemming from questions of contract interpretation or application. In a case like the present one, however, the problem is not one of mere contract interpretation, but rather of a basic change in the very protective terms of the pre-merger agreement itself. In effect, N&W is claiming that it has a post-merger agreement which drastically alters the "formula" to be used in calculating merger benefits as provided for in the pre-merger agreement. Petitioners argument that this position is based on any language in the pre-merger agreement simply does violence to the plain meaning of the words in the pre-merger agreement.

Secondly, even if this dispute, despite the fact that agreement 1-A on its face drastically reduces compensation protection, were deemed merely one concerning "interpretation" of that agreement, Railway Labor Act procedures, if blindly applied, could become an instrument for destroying basic employee protection agreed upon as a condition for consolidation. It would be tantamount to conferring upon railway labor and management a carte blanche invitation to ignore the proviso, included in the third sentence of Section 5(2)(f), that agreements dealing with merger related employee interests must pertain to the protection of those interests, to leave to the sole discretion of the unions both the question of whether or not an agreement, in fact, complied with that proviso, and whether or not, in the event an employee challenged the adequacy and fairness of such an agreement, a grievants claim would even be processed.

Finally, Congress clearly expressed its will that the Interstate Commerce Act would be "exclusive and plenary" so far as necessary to carry into effect the objects of that Act. Leaving open the doors of the courts to employees who find themselves in the position of having basic

merger protection taken away by agreement at the post-merger stage is simply to recognize the inherent realities of the railroad industry and to give full play to the protective scheme embodied in the Interstate Commerce Act.

In summary, trainmen submit that had incorporation been successfully disputed at the trial level, the District Court would have been required to assume jurisdiction over this dispute on the basis that the post-merger agreements clearly violated the provision of Section 5(2)(f) and gave rise to an action under Sections 8 and 9. Any other result would be tantamount to holding that in the post-merger stages a carrier is free to seek a collective agreement which destroys out of hand the protection solemnly promised before the Commission as a condition of its approval of the consolidation sought.

III. IMPLEMENTING AGREEMENT 1-A, IN FACT, SUBSTANTIALLY ABROGATED EMPLOYEE PROTECTION GUARANTEED BY THE PRE-MERGER AGREEMENTS AND VIOLATED THE PROVISIONS OF SECTION 5 (2) (f) OF THE INTERSTATE COMMERCE ACT.

Petitioner's contention regarding post-merger agreement 1-A is that this agreement "did not abridge any rights previously vested in respondents by the 1962 agreement * * *," (petitioner's brief, p. 51); "that 1-A is fully consistent with the policy and provisions of Section 5(2)(f) of the Interstate Commerce Act" (petitioner's brief, p. 40); and, therefore, is a binding and enforceable agreement which "disposes of respondents' claims in this proceedings" (petitioner's brief p. 51). In support of this argument N&W contends that the courts below "ignored the major additional benefits with respect to matters other than compensation . . . under the agreement . . ." (petitioner's brief, p. 41); that the Trainmen's National Union

found agreement 1-A ". . . was in conformity with the 1962 agreement and was necessary to implement and effectuate the general protection standards of that agreement . . ." (petitioner's brief, p. 51); and that the courts below erred in "the conclusion . . . that an agreement subsequent to Commission approval of a merger is invalid unless it is totally consistent with any previous order entered by the Commission for protection of the covered employees . . . (under) . . . Section 5(2)(f)" (petitioner's brief, p. 51).

The holding of the courts below with respect to 1-A is summarized by the Court of Appeals as follows:

> "* * * Here the subsequent agreement abridged rights previously vested in the appellees by virtue of the I.C.C. order. The agreement in *Arnold* did not take away rights already granted, but merely added a new term to the I.C.C. order. The agreement now before us, in contrast, goes to the very heart of the protections to be afforded the appellees under the order. Furthermore, we find implementing Agreement 1-A to be contrary to the policy of the Act, as embodied in the second sentence of Section 5(2)(f), which expressly makes provision to protect employees affected by a merger. The appellees here would appear to be precisely those employees protected by the provisions of the Act. The merger split their seniority district and, as a result, they were unable to receive the working time previously obtainable before the merger—no matter which option they chose. As the 1967 (sic.) agreement abrogated certain rights and protection previously guaranteed to the appellees, we are in agreement with the District Court that the agreement is unenforceable. An agreement made pursuant to the last sentence of Section 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order. Nor may it frustrate

the policy of the Act, as Implementing Agreement 1-A clearly did in the present case."

Obviously the courts below disagreed with petitioner's contention that 1-A did not "abridge" employee protection and that it was ". . . fully consistent with the policy and provisions of Section 5(2)(f)." Thus, the issue here can be sharply stated as follows: (1) did 1-A, in fact, substantially abrogate employee protection; and (2) if it did, was it contrary to policies and provisions of Section 5(2)(f)?

In considering these questions, it seems important to point out that petitioner's argument has placed it on the horns of a dilemma. By arguing that 1-A doesn't, in fact, substantially abrogate protective benefits, petitioner impliedly recognizes that if it *does,* logic and reason require the conclusion that Section 5(2)(f) has been violated. In other words, it would simply make no sense to argue that a post-merger agreement which "substantially abrogates" basic merger protection due adversely affected employees could conceivably be one "pertaining to the protection of the interests" of those employees as required by Section 5(2)(f). In the previous section, respondents attempted to show that an agreement which violates the provisions of the third sentence of Section 5(2)(f) should be deemed actionable under 49 U.S.C. Sections 8 and 9, if the protective objectives of the Interstate Commerce Act are to be realized. In this section trainmen will simply call the court's attention to the basis for the lower courts' finding that the post-merger agreements, in fact, substantially abridged "the very heart of the protections" promised in the pre-merger agreement.

In considering the pertinent evidence, trainmen urge the court to keep in mind that *the lower courts did not hold,* as N&W has contended, *that a post-merger agreement must be "totally consistent with any previous order*

* * *" (petitioner's brief p. 51), or that "Section 5(2)(f) does not permit the parties to reach agreements subsequent to Commission approval which deviate from the conditions which the parties had originally agreed upon * * *" (petitioner's brief, p. 40). On the contrary, the courts held that "an agreement made pursuant to the last sentence of Section 5(2)(f) *may vary the protections* * * * but it *may not substantially abrogate employees rights* * * *. Nor may it frustrate the policy of the Act, as Implementing Agreement 1-A clearly did in the present case." (A. 189).

In considering why the courts below found that 1-A clearly abridged employee protection, it is necessary to compare the terms of the pre-merger agreement with those of Agreement 1-A, as interpreted by N&W, i.e. the interpretation accepted by the lower courts as true. Regarding compensation protection, the pre-merger agreement guaranteed the trainmen that they would "not be deprived of employment or placed in a worse position with respect to compensation at any time during such employment * * *" (Joint Exhibit No. 1, A. 67). The formula for assuring an employee the promised compensation protection is found in Joint Exhibit No. 4 (A. 77), and basically provides that an "average monthly compensation shall be arrived at by taking the *total compensation received by* the affected employee for the last 12 months in which he performed service * * * and then dividing by 12 * * *. If the said affected employee's compensation is less in any month because of the merger than the aforesaid 'average monthly compensation,' he shall be paid the difference * * *." (A. 77).

On the other hand, post-merger agreement 1-A would all but eliminate compensation benefits to these trainmen. Under 1-A benefits would be calculated in accordance with the following formula:

> "(b) For the purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962, relative to construing the above-mentioned Agreement for Protection of Employees, the 'test period' for employees covered hereby shall be the period October 16, 1963—October 15, 1964, both dates inclusive. The 'Average Monthly Compensation' for employees covered hereby shall be arrived at by taking the total compensation received by the affected employee for service performed on the former Sandusky Line of Pennsylvania Railroad during the 'test period' and divided by 12; * * *."

It should be pointed out that the foregoing formula in the post-merger agreement specifically states that it is "for purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962 * * *." The significance of this provision is that Section 1 of the pre-merger agreement promises each employee an "average monthly compensation" based upon "total compensation for the last 12 months in which he performed service * * *," without any limitation as to whether that service was performed on the Sandusky Line or elsewhere within the employees seniority district. This plain fact is the basis for the holding of the courts below that agreement 1-A substantially abridged the protection promised by the pre-merger agreement.

The practical consequences of N&W's interpretation of 1-A are illustrated by the case of trainman Nemitz. Nemitz earned $7,000.00 throughout the Pennsy's Toledo Division during the 12 months before the merger. Under the formula in the pre-merger agreement, therefore, his average monthly compensation was $583.34 ($7,000.00 ÷ 12). To the extent his post-merger monthly earnings fell short of $583.34 as a result of the merger, his earnings should have been supplemented to reach that amount.

N&W contends that agreement 1-A entitled Nemitz to an "average monthly compensation" of $194.40 ($2,346.00 or his total Sandusky test period earnings divided by 12). This amount is probably less, or at least not much more, than Nemitz was entitled to receive by way of unemployment compensation from the Railroad Retirement Board. The practical importance of this fact is underscored in the "Letter of Understanding" of October 25, 1965, signed by N&W Vice President Wyatt, who referred to Railroad Retirement benefits as follows:

> "You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowances due the employee and remitted to that Board." (A. 91).

What this proviso meant, of course, was that N&W by delaying payments because it didn't have Pennsy earnings records was, in effect, forcing the employees who couldn't find other work to collect unemployment benefits which would have to be paid back to the Railroad Retirement Board when the limited benefits which N&W proposed to pay were actually received. The net result was that most trainmen actually received little or none of the very limited benefits which N&W purported to pay under 1-A because when these limited benefits were finally paid, N&W simply deducted any amounts which had been paid as unemployment benefits and reimbursed the Railroad Retirement Board as it is required by law to do. As shown at page 31 *supra,* the total net benefits paid to the approximately 25 trainmen, after the Railroad Retirement Benefits and overpayments under the "temporary" agreement were deducted, came to $6,494.40, or an average total of $259.77 a man for the entire 18 month period

during which these trainmen were waiting to be recalled to work at Sandusky.

The Commission has indicated that this dispute arose when "N&W said it would pay only the difference between plaintiffs' N&W wages and their average monthly wages on the Sandusky Line alone in the twelve-month period before the acquisition * * *." (Commission's brief, p. 8). This observation points up the inherent unfairness in N&W's position and, perhaps, a basic misconception about this dispute on the part of the Commission. It is, we submit, inherently contradictory to calculate "average monthly wages" on the basis of earnings for a 3 or 4, or 5 month period divided by 12. The quotient arrived at bears no relationship to average monthly earnings either at Sandusky or for the entire Toledo Division. We fail to see how such a quotient can rationally be called an "average" in any meaningful sense. Why divide by 12 if an employee worked only a third or a half of the time at Sandusky? Would it not make as much sense to divide total Toledo Division earnings by the number of months actually worked at Sandusky? The quotient arrived at would be as removed from anything reflecting an "average monthly compensation" as the formula proposed by N&W. Indeed, if N&W had proposed to pay merger benefits upon a formula reflecting "average monthly wages on the Sandusky Line alone for the twelve month period before the merger," as the Commission has suggested, this dispute would never have reached litigation. Such a formula could easily be worked out by simply taking total Sandusky Line earnings for the 12 month period and dividing *by the number of months actually worked at Sandusky during that period.* In this event, the quotient would truly reflect "average monthly earnings at Sandusky." As the deposition of Local Chairman Fitz shows, had N&W proposed such a formula the Sandusky trainmen would despite its depar-

ture from the formula provided in the pre-merger agreement, have accepted it as a means of determining their protective benefits. (See Fitz deposition pp. 56-57.)

N&W has also argued that the employees received "major additional benefits with respect to matters other than compensation which the employees were entitled to under the agreement * * *." N&W's understanding of these "major additional benefits" is summarized at p. 42 of its brief:

> "These features may be compared with the protection afforded by the agreements. First, *under these agreements,* all employees of the Sandusky Line are deemed adversely affected by the transaction with no necessity of proof of this fact. Second, the employee is guaranteed continued *employment* for his entire working life. Third, the employee has the opportunity to become employed by the Norfolk and Western and thereby to continue his residence in Sandusky, Ohio if he so wishes. Fourth, the Norfolk and Western agrees to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and the employee's labor organizations concerning rates of pay, rules and working conditions with certain minor exceptions. Fifth, both the employment and compensation protection of the agreements continue for the working lifetime of the employee.
>
> "Even when the compensation protection afforded *by the agreements* and protection of all earnings over the Toledo Division during the four year statutory period are compared, without considering other elements of protection, the protection *provided by the agreements is preferable.* While *the formula fixed by the agreements* protects less earnings during the four years immediately following the merger, it continues to offer protection beyond the four year statutory period for the full working life of the employee."

This argument is demonstrably spurious. While agreement 1-A does provide that the trainmen "are hereby certified as adversely affected as of October 16, 1964," of what benefit was it to them to be so "certified" if the only conceivable benefit in being "certified," namely, their eligibility for protective benefits, was abrogated by the very agreement which "certified" that they were adversely affected.

The second and third alleged "major additional benefits" namely, "guaranteed continued employment for . . . entire working life, and the opportunity to work for N&W at Sandusky," are unequivocally provided for in the pre-merger agreement and are not touched upon in 1-A. The pre-merger agreement states: "On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western *will take into its employment all employees* represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this agreement or subsequent thereto up to and including the date the merger is consummated, *who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment:* * * *." (A. 67).

The fourth item, namely, assumption by N&W of "all contracts, schedules and agreements * * *," is also provided for exclusively in the *pre-merger agreement*. Section 3 of the pre-merger agreement provides in pertinent part:

> "On the effective date of said acquisition, Norfolk and Western will take over and assume all contracts, schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, * * * and

will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto."

The final additional benefit, according to petitioner, is that "both employment and compensation protection of the agreements continue for the working lifetime of the employee." As shown above, the protective benefits promised in the *pre-merger agreement* unqualifiedly extend to "any time during * * * (N&W) * * * employment * * *." What the post-merger agreement does is destroy this protection for the precise period it was intended to cover under the pre-merger agreement.

Close analysis of these alleged "major additional benefits," therefore, reveals that only the first i.e. "certification" that the employees already out of work for over a year were adversely affected, is contained in the post-merger agreement.

It is significant that N&W in describing these "additional benefits" indiscriminately refers to the "agreements" as the source of these alleged additional benefits. This verbal lumping together of the pre-merger and post-merger agreements points up the inherently untenable position of petitioner's argument; for N&W is here (i.e. pp. 41-42 of petitioner's brief) attempting to show that the "agreements" actually gave the affected employees more than the mandatory minimum required by 49 U.S.C. Section 5(2)(f). The irony in this contention is that while it is true that the pre-merger agreements afford greater protection than the minimal requirements of Section 5(2)(f), it is equally true that post-merger agreement 1-A affords palpably less protection than this mandatory minimum. For this reason, it was only necessary for the courts below to read the agreements in question, accept

N&W's interpretation of the post-merger agreements as true, and reach the obvious conclusion that 1-A literally obliterated all meaningful compensation protection afforded the trainmen by the pre-merger agreements without giving the slightest quid pro quo. For this reason, the courts simply held that an agreement which abrogates basic merger protection, while giving nothing in return, fails to comply with the requirements set forth in Section 5(2)(f).

In so holding, the courts were following the authorities which have interpreted this provision. These authorities were succinctly analyzed by the District Court as follows:

> "Defendant will contend that Joint Exhibit 10 (sic) represents an agreement entered into pursuant to the last sentence of 49 U.S.C. Section 5(2)(f) which reads:
>
> "* * * Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carriers by railroad and the duly authorized representative or representatives of its or their employees.
>
> "Assuming that this does constitute an agreement, and assuming that it provides for protective benefits to be calculated as the N&W claims that they are to be calculated, the Court is faced squarely with the question of whether such an agreement is to be enforced.
>
> 'Numerous other courts have had opportunities to address themselves to this question: e.g., *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 647 (2nd Cir. 1969); *Flaherty v. Kansas, Oklahoma and Gulf R.R.*, 252 F. Supp. 736 (E.D. Okla. 1966); *Roberts v. Lehigh & New England R.R.*, 323 F.2d 219 (3rd Cir. 1963). The courts in these cases simply assumed that the

agreement was in compliance with the statute and proceeded to consider whether this provision of the statute permitted the carrier and the union to change the I.C.C. order. In all of these cases it was held that it did. The ability to entirely rewrite the protective agreement does not necessarily imply the ability to lessen the Congressionally established minimum protection.

"The court in *Arnold v. Louisville & Nashville R.R.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. Louisville & Nashville R.R.*, 316 F.2d 22 (6th Cir. 1963), interpreted the provision of the statute in question as follows:

> "Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly authorized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by *adopting, supplementing* or *implementing* the provisions made by the Commission for their protection. 180 F. Supp. at 433-34.

"This interpretation of the statute was adopted by the District Court in *Clemens v. Central R.R. of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967) *rev'ed on other grounds*, 399 F.2d 825 (3rd Cir. 1968). This Court accepts this interpretation, that is that the agreement can alter, supplement, or vary the I.C.C. order so long as it does not abridge the protection afforded by the statute or the I.C.C. order."

In summary, the lower courts found, as a matter of fact, that the post-merger agreements abridged Section 5(2)(f) protection and were, therefore, unenforceable as

a matter of law. It is respectfully submitted that unless the third sentence of Section 5(2)(f) is construed to be a carte blanche invitation to carriers and employee representatives, whether by design or otherwise, to destroy employee protection afforded by statute or Commission Order, the rulings of the courts below with respect to agreement 1-A should be affirmed.*

IV. THE TRAINMEN ARE NOT BARRED FROM SUING BECAUSE OF THE EXHAUSTION OF REMEDIES DOCTRINE BECAUSE (A) THEY, IN FACT, EXHAUSTED EVERY ADEQUATE REMEDY AVAILABLE TO THEM; (B) THE ARBITRATION CLAUSE IN QUESTION WAS OPTIONAL, AND SINCE NEITHER N&W NOR THE UNION INVOKED ARBITRATION, THAT REMEDY WAS NOT MANDATORY; AND (C) THE DOCTRINE OF EXHAUSTION OF REMEDIES SHOULD HAVE NO APPLICATION IN A SUIT BY ADVERSELY AFFECTED RAILROAD EMPLOYEES FOR BENEFITS CONFERRED UNDER 49 U.S.C. SEC. 5(2)(f).

The lower courts rejected N&W's contentions respecting the exhaustion issue on two grounds: (1) the doctrine of exhaustion pre-supposes the existence of an adequate remedy, and since the record clearly shows that the trainmen "had reached a dead-end street in their attempt to utilize union remedies," they were not barred from suing by any failure to exhaust administrative remedies; and (2) the arbitration provision in the 1962 agreement

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* The trainmen at the trial level vigorously disputed N&W's contention that agreement 1-A was ever intended to govern the claims of trainmen with less than 12 months Sandusky earnings before the merger. They based their position on numerous documents of record, as well as documents and evidence which would have been presented had a trial been required. If, therefore, this court should, for any reason, find that agreement 1-A is enforceable, the trainmen at the very least are entitled to have this cause remanded to the District Court for a determination of the factual dispute as to the intent and scope of that agreement.

was "permissive," and, since neither the union nor the N&W had invoked arbitration, jurisdiction was not precluded on these grounds (A. 189-190).

After reading the entire record, the court of appeals concluded that it was "readily apparent from the record" that "it would have been a futile gesture for the appellees to have attempted to proceed further with the arbitration procedure * * *" (A. 192). This certainly understates the plight of the trainmen, who have described in some detail the three year effort which they made to get their claim for benefits paid under the terms of the January 10, 1962 agreements. This factual background, considered in the light of this Court's pronouncements in *Republic Steel v. Maddox,* 379 U.S. 650 (1965), and *Vaca v. Sipes,* 386 U.S. 171 (1967), suggests several compelling reasons, as a matter of law and policy, for upholding the court of appeals finding that "appellees in this case have fulfilled any possible requirement for exhaustion of administrative remedies * * *."

(1) The trainmen's claims are for monetary protection explicitly promised them by the terms of an agreement intended to meet the requirements of Section 5(2(f) of the Interstate Commerce Act. That Act obviously has as a primary policy objective the protection of railway employees against the monetary hardships which frequently result from the disruptive effects of rail mergers. It seems clear from the thrust of the Interstate Commerce Act that Congress intended that this policy objective would override potentially conflicting policies of federal law, so far as necessary to fulfill this objective. 49 U.S.C. Section 5(11), for instance, relieves carriers and employees of all restraints of law, so far as necessary to fulfill the objectives of the Act. Furthermore, the very context from which disputes such as the one at hand will often spring

differs in kind from that generally giving rise to questions of the proper application of the exhaustion of remedies doctrine. In addition to causing disruption of prior employer-employee alignments, Section 5 transactions will, of necessity, also frequently upset employee-union alignments. This fact is apparent in the instant case.

On October 15, 1964, these trainmen were Pennsy employees and members of local lodge 844. Their General Grievance Committee was made up predominantly of local unions of Pennsy employees with a few locals from the Detroit, Toledo, and Ironton R.R., Chicago Union Depot Co., and Dining Car Stewards. The following day they were N&W employees in one of two local lodges (Columbus and Sandusky) made up of N&W employees among 53 local lodges in a General Committee which for the first time now represented N&W employees. This observation is meant to call attention to the obvious fact that claims of adversely affected employees for Section 5(2)(f) benefits following a rail consolidation may bear little similarity, in fact, to the traditional grievance claims of employees in the context of a stable, ongoing employer-union-employee relationship. In this regard, the Supreme Court has seemed to recognize that situations may arise wherein it would be inappropriate to even hold that an employee must attempt use of the contract grievance procedure. In *Maddox*, the Supreme Court made the following observations regarding the exhaustion of remedies under federal law at 379 U.S. 653, 654:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences

may arise as to the forms of redress then available.* * *

"Once it is established that the federal rule discussed above applies to grievances in general, it should next be inquired whether the specific type of grievance here in question—one relating to severance pay—is so different in kind as to justify an exception."

Maddox thus raises the question whether the claims of adversely affected employees for Section 5(2)(f) benefits in the aftermath of a rail merger is so different in kind as to justify an exception to the rule that employees must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. While the courts below impliedly either answered this question in the affirmative, or overlooked it by deciding as they did, respondents urge this Court to hold that claims of rail employees in this context justify the conclusion that the application of the federal exhaustion doctrine in this narrow situation would be inappropriate as tending to undercut the primary protective objectives of 49 U.S.C. Section 5(2)(f).

(2) Assuming, however, that the application of the exhaustion of remedies doctrine to the type of dispute at hand is deemed appropriate, the question arises as to what should be required of employees in the position of the respondent trainmen before it can be said they have made a sufficient attempt to use the available administrative remedies. The Supreme Court framed this question as follows in *Maddox* at 379 U.S. 652:

"If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey v. Moore*, 375 U.S. 335, 11 L. ed. 2d 370, 84 S. Ct. 363; *Labor Board v. Miranda Fuel Co.*, 326 F.2d 172."

Trainmen submit that the practical exigencies of their situation following the instant merger support the lower court's ruling that the "form or redress" they chose was, *if not the only possible remedy available to them,* at least a proper one.

The record shows that the union waited for nearly a year before attempting to invoke arbitration with respect to the trainmen's claims. By that time, however, there was clearly nothing to arbitrate except the possible question of whether N&W was excused from paying benefits because Pennsy's earnings records were allegedly not available. Respondents submit that the union's delay in pressing for arbitration against this factual background was, in itself, sufficient justification for filing suit. Certainly Congress could not have envisioned that the protective scheme of the Interstate Commerce Act would operate so that payments of benefits to adversely affected employees, at the time they were most urgently needed, would hinge on such fortuities as whether or not the promising carrier had taken timely pains to get earnings records, or whether or not the employee's union was diligent or perfunctory in the handling of their claims. As set forth above, the delay in making benefit payments forced the trainmen to seek unemployment benefits which eventually had to be refunded from the very limited merger benefits which were, in fact, finally paid nearly two years after the merger. The point is that claims for merger related compensation protection will often arise in circumstances where delay in payment will all but negate the purpose of conferring protection in the first place; so that, from the employees point of view, the ameliorative purposes of the Act will be reduced to a mockery unless access to prompt relief is at hand. At any rate, the employees in the instant case did everything possible for

three long years to exhaust their remedies. It is doubtful from the record that they would have been in any different position if they had tried for another three years to get relief short of litigation.

N&W urges that *Bonnot v. Congress of Independent Union's Local No. 14*, 331 F.2d 355 (8th Cir. 1964), is in conflict with the authorities cited by the courts below to support their finding that arbitration language in question is "permissive." In analyzing N&W's *Bonnot* argument, the Appeals Court commented as follows:

> "In *Bonnot*, the Court of Appeals made the statement, quoted *supra*, which in effect characterized the 'may' clause as absolutely mandatory, relying upon *Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960) and *Deaton Truck Line, Inc. v. Local Union #612*, 314 F.2d 418 (5th Cir. 1962). The *Deaton Truck Line* case interpreted the *American Manufacturing Company* case, and citing that case the Court of Appeals stated:
>
> > "Clearly, however, 'may' should be construed to give either party the option to require arbitration. *Deaton Truck Line, Inc. v. Local Union #612, supra*, p. 422.
>
> "Thus the cases cited by *Bonnot* do not compel the conclusion reached by the Eighth Circuit that the 'may' clause is absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim" (A. 191).

Bonnot, of course, is sharply distinguishable on its facts from the instant controversy since there was not even an assertion by the plaintiff in *Bonnot* that there had been even the slightest attempt to use the arbitration procedures called for by the contract in question. Thus *Bonnot* would not control the outcome here even if the courts below had construed the contractual arbitration language as being mandatory.

Bonnot, further, involved an action brought under Section 301 of the Labor Management Relations Act. Assuming that this court agrees that the "may" clause in the context which gave rise to the dispute in *Bonnot* was absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim, and that this is so even where the grievant has done everything possible to exhaust his administrative remedies—which *Bonnot* did not hold—trainmen submit that the lower courts' interpretation of the "may" clause in the instant case was, nevertheless, clearly correct. If the "may" clause here is interpreted as giving employees who are denied benefits the option of arbitration only if their union agrees to do so or abandonment of their claims if the union decides not to arbitrate, the protective promises of the Act, the Commission's order, and the pre-merger agreement, in cases like the instant one, will be reduced to nothing less than a cruel hoax. Trainmen submit that neither *Bonnot* nor any other authority justify such a result.

(3) Finally, petitioner has argued that *Vaca v. Sipes* precludes the trainmen from suing their employer unless the employee can prove that the union "breached the duty of fair representation," which the respondents, according to N&W, have failed to show. Respondents submit that the holdings of the courts below are consistent with this court's reasoning in *Vaca* in all material respects. In considering petitioner's *Vaca* argument the Court of Appeals stated:

> "Appellant calls our attention to the case of *Vaca v. Sipes, supra,* an employee action against the union for breach of its duty of fair representation, wherein the Supreme Court indicated that exhaustion was not excused unless the employee proved that the union had breached its statutory duty of fair representa-

> tion. To constitute such a breach, the union must have acted in an arbitrary, discriminatory, or bad faith manner. However, the Supreme Court also indicated in *Vaca v. Sipes* that an exception to the exhaustion requirement may exist where the effort to proceed with further administrative remedies would be futile. In the later case of *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 330 (1969), the Supreme Court affirmatively recognized the validity of this exception. *That it would have been a futile gesture for the appellees to have attempted to proceed further with the arbitration procedure, is readily apparent from the record before us.*" (A. 192). (Emphasis added.)

Petitioner, of course, criticizes the Court of Appeals citation of *Glover* as having "no conceivable application to the present controversy." (Petitioners' brief, p. 57). It is submitted, however, that while *Glover* is obviously factually dissimilar to the case at hand, the rationale of the decision has striking application to the facts in the present case. In *Glover*, the court concluded that where "the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race" the plaintiffs "should [not] be required to submit their controversy to 'a group which is in large part chosen by the [defendants] against whom their real complaint is made.'" If, however, the post-merger agreements in the present case substantially destroy all merger protection of these trainmen and if, as N&W contends, the union intentionally contracted to do this, the trainmen would be as palpably helpless in the matter of obtaining merger protection here, as the Negro union members in *Glover* would have been if they had been required to leave the matter of promotions to the

processes of arbitration. N&W impliedly recognizes this fact since it takes pains to argue that:

> "In the present case, the determination by respondents' collective bargaining representative that respondents' claims were without merit and did not warrant submission to arbitration was clearly a reasonable and informed decision. Respondents' collective bargaining representative had negotiated *agreements* with the N&W which clearly fixed respondents' protective benefits. Moreover, the benefits available to the respondents *under the agreements* thus made were substantial and preferable in many respects to the benefits which might have been prescribed by the Commission in the absence *of such agreements* (as discussed at pp. 41-45, *supra*)." (Petitioners' brief p. 58).

This argument impliedly recognizes that unless the post-merger agreement does not abrogate merger benefits, its *Vaca* argument falls of its own weight. As shown above, the "benefits" to which N&W is referring are entirely contained in the pre-merger agreement, whereas the post-merger agreements destroy all meaningful protection contained in the pre-merger agreements. Here again petitioner attempts to gloss over and blurr this critical distinction by indiscriminately lumping the pre and post-merger agreements together under the term "agreements" so as to give the false impression that the latter actually conferred benefits upon the trainmen.

In any event, the rationale in *Vaca* completely supports the decision of the lower courts on the exhaustion of remedies question. *Vaca*, of course, involved the question of whether the Garmon* pre-emption doctrine applied to an employee's suit against his union for alleged

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* *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773.

breach of the union's fair representation duty. There the union had processed the grievant employee's claim for wrongful discharge because of medical reasons into the fourth of five possible steps in the contract grievance procedure. At this point, it received information from a doctor hired by the union to help support grievant's claim which, in fact, *did not support grievant's claim.* The union was satisfied that there was insufficient medical evidence to support grievant's position. The grievant employee balked at this suggestion and demanded that the union, notwithstanding this contrary medical evidence, proceed to arbitration. When this request was refused, the employee sued the union for failing to press his claim through the final step of arbitration.

This court held that the suit was essentially one under Section 301 of the Labor Management Relations Act (29 U.S.C. Section 185) over which the courts have jurisdiction even though the employer's conduct is arguably an unfair labor practice within the jurisdiction of the National Labor Relations Board. On the exhaustion of remedies question the court said:

> "However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee *must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.* Republic Steel Corp. v. Maddox, 379 US 650, 13 L ed 2d 580, 85 S Ct 614. However, because these contractual remedies have been devised and are often

controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U.S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903.

Trainmen submit, therefore, that for several reasons *Vaca* is fully consistent with the rulings below: (1) the record convincingly shows that the trainmen attempted use of the grievance procedure; (2) the union's handling of the trainmen's grievances—if indeed they can be aptly characterized as mere grievances—was at best dilatory and perfunctory; (3) *Vaca* is critically distinguishable from the instant case in that *Vaca* presupposes a situation where the union has utilized available administrative processes but has chosen in good faith and for good cause to discontinue processing grievant's claim short of the final step in the administrative process. Here, despite the fact that N&W had not even a color of right for delaying promised benefits for over a year following the merger, and despite the fact that when benefits were paid they were grossly less than what was promised these men *before* they elected N&W employment, the trainmen nevertheless were denied any opportunity to seek their remedy under the contract; and (4) *Vaca*, finally, is distinguishable in that it presupposes a stable employer-union relationship in which the union has a legitimate concern in seeing that the common law of the plant is permitted to develop unhampered by time consuming, frivolous grievances. In the instant case, none of these objectives are jeopardized by permitting adversely affected employees access to the courts. Here the claims of the trainmen are for monetary protection which became due *before* they were ever called

back to work at Sandusky following the merger. Obviously trainmen's claims are not frivolous; and, after nearly three full years of temporizing with the trainmen's claims, of fruitless letter writing and meetings, the union can hardly be heard to complain that its influence will be undermined by permitting the trainmen to resort to litigation.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS J. MURRAY, JR.,
Attorney for Respondent.